No. 06-17[illegible] 2007

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In the Supreme Court of the United States

STEVEN M. BELL

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 435 (1986), whether in establishing a prima facie case of discrimination, if comparative analysis evidence is presented that would support an inference of discrimination the California Supreme Court's refusal to perform such an analysis violated petitioner's constitutional rights to due process, equal protection, right to a fair and impartial jury, and a reliable determination of his death sentence.

2. In light of this Court's decision in *Cunningham v. California*, 127 S.Ct. 856 (2007), whether California's death penalty law violates the Fifth, Sixth, Eighth and Fourteenth Amendments by permitting the trier of fact to impose a sentence of death without unanimously finding the existence of aggravating factors beyond a reasonable doubt.

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Petitioner, Steven M. Bell, prays that this Court issue a Writ of Certiorari to review the opinion and judgment of the Supreme Court of California entered on March 28, 2007.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of California, affirming Petitioner's convictions and death sentences, is reported as *People v. Bell*, 40 Cal.4th 582, 54 Cal.Rptr.3d 453, 151 P.3d 292 (2007), and is attached hereto at A-1. The opinion of the California Supreme Court, filed March 28, 2007, denying a Petition for Rehearing is reported at 2007 Cal. LEXIS 3091 (Cal., Mar. 28, 2007), and attached hereto at A-55.

STATEMENT OF JURISDICTION

The California Supreme Court filed its opinion on February 15, 2007. Petitioner filed a timely petition for rehearing on March 1, 2007. On March 28, 2007 the court issued an order denying the petition for rehearing. This Petition for Writ of Certiorari is being filed within 90 days of the California Supreme Court's March 28, 2007 order denying the petition for rehearing, as required by Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

A. Federal Constitutional Provisions

Fifth Amendment: "No person shall ... be deprived of life, liberty, or property, without due process of law ..."

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment: "No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal *protection of the laws.*"

B. State Statutory Provisions

Relevant California Penal Code sections, which are attached at A-56, include the following: §§ 190, 190.1, 190.2, 190.3, 190.4.

STATEMENT OF THE CASE

In an information filed August 12, 1992, defendant was charged with murder (count 1: Pen. Code § 187, sub. (a)); with an allegation of personal use of a deadly weapon (§ 12022, subd. (b)) and special circumstance allegations of murder in the commission of robbery and burglary (§ 190.2, sub. (a)(17)); residential robbery (count 2: §§211,212.5) with personal use and great bodily injury allegations (§§12022, sub. (b), 12022.7); and residential burglary (count 3: §§459, 460) with personal use and great bodily injury allegations (§§ 12022, subd. (b), 12022.7). The burglary charge, its accompanying allegations, and the burglary-murder special-circumstance allegation were dismissed before trial on defendant's motion under section 995.

During voir dire, the defense raised three motions pursuant to *Batson* v. *Kentucky*, 476 U.S. 79 (1986) and *People* v. *Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978) claiming the prosecutor had used peremptory challenges to deliberately exclude African-American Women, people of Filipino origin or decent, and lesbians. (24 R.T. 1500,1506, 1511, 1528; 26 R.T. 1734-1735, 1743-1744; 7 C.T. 1644.)[1]

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[1] "R.T." refers to the Reporter's Transcript and "C.T." to the Clerk's Transcript of Petitioner's Trial, with the volume number preceding and the page number following the abbreviation.

The trial court denied the *Batson/Wheeler* motions on the ground that the defense had failed to establish the requisite prima facie case. (24 R.T. 1502; 26 R.T. 1753, 1755, 1759; 61 R.T. 4629-4630.)

During pretrial proceedings, at the start of the penalty phase, and again in his motion for a new trial, petitioner moved to prohibit the imposition of the death penalty. (14 R.T. 409; 43 R.T. 3522; 61 R.T. 4620; 2 C.T. 293; 4 C.T. 717.) Petitioner argued that California's Death Penalty Law ("DPL") was unconstitutional because it permits arbitrary and capricious imposition of the death penalty. (14 R.T. 409; 2 C.T. 295-296.) The trial court denied petitioner's motion on the ground that the California Supreme Court had previously rejected these arguments. (14 R.T. 410, 420; 43 R.T. 3523; 61 R.T. 4633-4634.)

On November 22, 1993, the jury found defendant guilty of first degree murder and robbery, and found true the robbery-murder special-circumstance allegation and the allegations of personal use of a deadly weapon and infliction of great bodily injury. (42 R.T. 3500-3502; 8 C.T. 1835-1839.)

On December 17, 1993, the jury returned a verdict of death. (54 R.T. 4501; 8 C.T. 1865.) On March 4, 1994, having denied the automatic motion to reduce the penalty and defendant's motion for a new trial (61 R.T. 4634, 4650), the trial court sentenced defendant to death for special circumstance felony-murder (Cal. Penal Code §§ 187, 211/190.2 subd. (a)(17)) in count 1. 61 R.T. 4656. On February 15, 2007, the California Supreme Court rendered its decision on direct appeal. The court affirmed the conviction in all counts as well as the judgment of death and on March 1, 2007, petitioner filed a timely petition for

rehearing. On Mach 28, 2007, the California Supreme Court denied rehearing.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO ENABLE THIS COURT TO CLARIFY WHAT EVIDENCE A COURT MUST CONSIDER IN DETERMINING WHETHER A "REASONABLE INFERENCE" OF DISCRIMINATION WAS ESTABLISHED UNDER THE FIRST STEP OF *BATSON*.

Defense Counsel objected to the removal of six jurors based on impermissible group bias. Defense counsel first established each prospective juror was a member of a cognizable group, and offered the following evidence in support of his claim: the prosecutor struck all or most of a group, that there was no apparent reason to challenge the prospective jurors other than their membership in the group, comparative analysis evidence, and offered to supplement his arguments with statistical information. The California Supreme Court refused to conduct a comparative analysis at the prima facie step. Although, this Court has clearly stated that a "reasonable inference" is a lower threshold than a "strong likelihood", the California Supreme Court fails to embrace the meaning of a "reasonable inference," and refused to evaluate "all relevant circumstances" in order to determine whether a reasonable inference was established. Therefore, it is necessary for this Court to address what constitutes a "reasonable inference" and what evidence is permissible to establish such under the first step of *Batson v. Kentucky*, *supra*, 476 U.S. 79.

Under *Batson v. Kentucky*, 476 U.S. at 84-85, a prosecutor is precluded from using peremptory challenges to

strike prospective jurors based on group bias.[2] A *Batson* motion involves a three-step process: (1) the proponent must establish a prima facie case of purposeful discrimination; (2) if a prima facie case is shown, the prosecutor must offer a race-neutral explanation for the peremptory challenges at issue; and (3) the court must determine whether the proffered justifications are legitimate or sham, i.e., whether the proponent has met his burden of proving purposeful discrimination. *Id.* at 96-98. Petitioner's case focuses on the first step.

In order to establish a prima facie case of discrimination the proponent must: (1) establish that the persons excluded are members of a cognizable group; and (2) point to circumstances supporting a reasonable inference that such persons are being challenged because of their membership in the group, rather than because of any specific bias. *Wade v. Terhune*, 202 F.3d 1190, 1195 (9th Cir. 2000). Under *Batson*, a prima facie showing is one that supports a "reasonable inference" of systematic exclusion of a cognizable group. *Batson v. Kentucky*, *supra*, 476 U.S. at p. 93. This Court has specifically rejected a requirement that the objecting party show either a "strong likelihood" or that it is "more likely than not" that the other party's peremptory challenges, if unexplained, were based on impermissible group bias. *Johnson v. California*, 545 U.S. 162, 162 L.Ed.2d 129, 125 S.Ct. 2410 (2005).

This Court held that a defendant satisfies the sufficiency requirement of *Batson's* first step by producing evidence merely sufficient to permit the trial judge to draw an inference of discrimination. *Johnson v. California*, *supra*,

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[2] Bias against "members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds." *People v. Wheeler*, 22Cal.3d 258, 276-277 (1978).

545 U.S. at p. _, 162 L.Ed.2d at p. 135. Thus, "the threshold for a making a prima facie *Batson* claim is quite low[.]" *Boyd v. Newland*, 455 F.3d 897, 903 (9th Cir. 2006). This Court defined "inference" as "a conclusion reached by considering other facts and deducing logical consequence from them." *Johnson v. California*, *supra*, 545 U.S. at _, fn. 4, 162 L.Ed.2d at p. 138, citing Black's Law Dictionary 781 (7th ed. 1999).

In *Batson* this Court stated that a court should consider "all relevant circumstances" in drawing an inference. *Batson v. Kentucky*, *supra*, 476 U.S. at pp. 96-97. Petitioner supplied the state courts with comparative analysis evidence, but the California Supreme Court refused to conduct a comparative analysis stating:

> *Miller-El v. Dretke*, *supra*, 545 U.S. at pages 241–252, does not mandate comparative juror analysis in these circumstances. As we have previously explained, *Miller-El* arose at the third stage of a *Wheeler-Batson* inquiry, "after the trial court has found a prima facie showing of group bias, the burden has shifted to the prosecution, and the prosecutor has stated his or her reasons for the challenges in question." (*People v. Gray* (2005) 37 Cal.4th 168, 189 [33 Cal. Rptr. 3d 451, 118 P.3d 496].) The high court did not consider whether appellate comparative juror analysis is required "when the objector has failed to make a prima facie showing of discrimination." (Ibid.) A fortiori, Miller-El does not mandate comparative juror analysis in a first-stage *Wheeler-Batson* case when neither the trial court nor the reviewing courts have been presented with the prosecutor's reasons or

have hypothesized any possible reasons." *People v. Bell*, 40 Cal. 4th 582, 601 (Cal. 2007).

Contrary to the California Supreme Court's ruling *Batson* supports the use of comparative juror analysis. See *Miller-El v. Dretke*, 545 U.S. 231, __, 125 S. Ct. 2317, 2325-2338, 162 L.Ed2d 196, 213-228 (2005). Furthermore, a comparative juror analysis may be conducted even when the trial court has concluded that the defendant failed to make a prima facie case. (*Boyd v. Newland*, *supra*, 455 F.3d at p. 907.)

In petitioner's case, defense counsel made three motions under *People v. Wheeler*, 22 Cal.3d 258 (1978) and *Batson v. Kentucky*, 476 U.S. 79 (1986), claiming the prosecutor had used peremptory challenges to deliberately exclude African–American women, Filipino-Americans, and lesbians. A consideration of the relevant circumstances establishes evidence sufficient to make a prima facie case under the "inference" standard.

The first set of *Batson/Wheeler* objections came in response to the prosecutor's use of peremptory strikes against two African–American women, Gwendolyn J. and Lisa J.-S. Initially, defense counsel established African-American women are a cognizable group.[3] (24 R.T. p. 1505-1506; 26 R.T. p. 1734-1735, 1749; 61 R.T. 4616-4618; 7 C.T. 1645.) This group may be distinguished from African-Americans in general. *People v. Motton*, 39 Cal.3d 596, 605, 217 Cal.Rptr. 416, 704 P.2d 176 (1985). Therefore, it is not evidence of nondiscrimatory purpose that the prosecutor did not challenge African American males. The prosecutor

[3] The trial court acknowledged that African-American women were a cognizable group. (26 R.T. 1751-1753; 61 R.T. 4627.)

struck two of the three African-American women on the panel, and was interrupted and admonished by the court prior to the possibility of exercising a challenge to the third. (26 R.T. 1741.) Defense counsel pointed out that Gwendolyn J.'s and Lisa J.-S.'s questionnaires "were fairly identical [to others who had not been challenged], in that they were nondescript, and their oral voir dire had nothing to indicate really anything to show a bias either way. Neither of them were controversial in any manner..." (26 R.T. 1736.)

Neither Gwendolyn J. nor Lisa J-S. provided indicators that would make them likely to be challenged for reasons other than race. Neither professed negative experiences with law enforcement or bias towards any type of witness. Neither offered equivocal, incomplete or negative views on the death penalty. Even the trial court expressed that "it makes no sense for the people to exclude the cognizable group, of which the victim's mother was a member." (61 R.T. 4628-4629.) Although, the trial court engaged in the very kind of stereotyping prohibited by *Batson/Wheeler* – assuming that African-American women would identify with a trial participant based solely on like race – the trial court's acknowledgement lent credence to defense counsel's argument that there was no nondiscriminatory reason to strike Gwendolyn J. or Lisa J.-S. Fairly reviewing the record, the totality of relevant facts establish an inference of discriminatory purpose in the challenges of Gwendolyn J. and Lisa J.-S.

The second set of *Batson/Wheeler* objections came in response to the prosecutor's use of peremptory strikes against two women defense counsel identified as lesbians, Francene B. and Lynne W. (24 R.T. 1500, 1528.) In response the trial court asked, "What's your factual basis for that?" (24 R.T. 1501, 1528-1529.) Defense counsel informed the court of the numerous reasons that supported

the fact that Francene B. and Lynne W. were lesbians including: physical appearance, participation in marches and rallies in support of gays and lesbians in the military and feminist issues, and employment in non-traditional jobs. (21 R.T. 1059, 1072; 22 R.T. 1219-1221; 24 R.T. 1501-1502, 1528; 11 C.T. 2377, 2380, 2511.) In doing so, defense counsel also highlighted the fact that there were no other discernable reasons for their exclusion. (24 R.T. 1502.) The trial court denied the objection in both instances, stating "[t]here is no factual basis" for concluding that these prospective jurors were lesbians. (24 R.T. 1502, 1528.) The trial court was mistaken that such a showing was required.

In determining whether a *Batson/Wheeler* error has occurred, it is perception of membership in the group, not actual membership, which counts. "[I]t is unnecessary to establish the true racial identity of the challenged jurors; discrimination is more often based on appearances than verified racial descent, and a showing that the prosecutor was systematically excusing persons who appear to be Black would establish a prima facie case under *Wheeler*." *People v. Motton*, 39 Cal.3d 596, 604, 217 Cal. Rptr. 416, 420-421, 704 P.2d 176, 180 (1985). The court's reasoning in *Motton* should apply to all cognizable groups. California has recognized sexual orientation as a cognizable group. Under Cal. Code Civ. Proc. § 231.5 (2006), "a party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds."[4] The real question was whether the prosecutor had stereotyped Francene B. and Lynne W. as lesbians and had peremptorily challenged them on that basis. Without denial from the

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[4] California added sexual orientation as a cognizable group in *People v. Garcia*, 77 Cal.App.4th 1269, 92 Cal.Rptr.2d 339 (2000).

prosecutor, the record establishes that the two women qualified at least as being a member of a cognizable class. Additionally, no other lesbian women were identified as being present on the panel of prospective jurors. Therefore, with the minimum record available, it appeared the prosecutor was systematically excluding lesbians.

Though a pattern of exclusion is not required to make a prima facie case, as the California Supreme Court recognized in *People v. Avila*, 38 Cal.4th 491, 549, 43 Cal.Rptr.3d 1, 133 P.3d 1076 (2006), a "'pattern of systematic exclusion' of a particular cognizable group from the venire raises an inference of purposeful discrimination, and that when such systematic exclusion occurs, everyone (the defendant, the excluded jurors, and the community) is harmed 'because the public confidence in the fairness of our system of justice is undermined.'" Quoting, *People v. Gore*, 18 Cal.App.4th 692, 22 Cal.Rptr.2d 435 (1993), and citing *Batson, supra*, 476 U.S. at p. 94, 106 S.Ct. 1712 ["Proof of systematic exclusion from the venire raises an inference of purposeful discrimination because the 'result bespeaks discrimination.'"].

The third set of *Batson/Wheeler* objections was in response to the prosecutor's use of peremptory strikes against two Filipino-Americans, Saldy P. and Charles B. (24 R.T. 1511; 26 R.T. 1743-1744, 1749; 7 C.T. 1644-1645.) The trial court acknowledged that Asian-Americans were a cognizable group.[5] (61 R.T. 4629.) Defense counsel noted that there had not been any other [than Saldy P. and Charles B.] "readily identifiable Asian-Americans." (26 R.T. 1749.) There was no disagreement with this observation. Thus, the record is that the only two Asian-American jurors on the panel were peremptorily stricken by the prosecutor. *People*

[5] As are Filipino-Americans. (*United States v. Murillo*, 288 F.3d 1126, 1131 (9th Cir. 2002).)

v. Avila, supra, 38 Cal.4th at p. 549; see also *People v. Guerra*, 37 Cal.4th 1067, 1102, 40 Cal.Rptr.3d 118, 129 P.3d 321, (2006), citing to *Johnson v. California*, 545 U.S. 162, 125 S.Ct. at pp. 2414, 2419 (2005) [the removal of all three African-American prospective jurors established a prima facie case]. Defense counsel further offered to supplement the charge of systematic exclusion by providing statistical data of the comparative population of Filipino-Americans in San Diego County. (26 R.T. 1744-1746.)

Additionally, Saldy P.'s and Charles B.'s questionnaires and oral voir dire were otherwise indistinguishable from those whom the prosecutor had not challenged. Of more cognizable significance, the record also includes that Charles B. was a 21 year-old married man with a young son. (13 R.T. 3034.) The fact that Charles B. was a parent of a young son, and thus might identify with the young victim and his mother, raises an inference that the prosecutor's challenge of Charles B. must have been discriminatory, because it is otherwise inexplicable. In fact, the only potentially equivocal response given by Charles B. was that, although he believed in the death penalty, he generally preferred life without the possibility of parole. (25 C.T. 1653; 13 C.T. 3044.) However, seated Juror No. 12 similarly indicated that she "perhaps" would choose life without the possibility of parole because of the finality of death. (23 R.T. 1380-1381.) Viewed fairly, and in totality, the record establishes an inference of discriminatory purpose in the challenges of Saldy P. and Charles B. As the foregoing arguments show, the record does not suggest grounds upon which the prosecutor might reasonably have challenged each of the prospective jurors in question.

The significance of the rights implicated and the prevalence of *Batson* claims is testament to the necessity for this Court's guidance. Moreover, given the fact that this is a capital case, the Court's resolution of these issues is

especially important to ensure the heightened reliability required in such cases. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Stewart, J., plur. opn.).

II. CERTIORARI SHOULD BE GRANTED TO ENABLE THIS COURT TO CLARIFY THAT CALIFORNIA CAPITAL JURORS MUST UNANIMOUSLY AGREE BEYOND A REASONABLE DOUBT ON THE FACTS CONSTITUTING THE AGGRAVATING CIRCUMSTANCES THAT THESE FACTORS OUTWEIGHED ANY MITIGATING CIRCUMSTANCES AND THAT DEATH IS THE APPROPRIATE PUNISHMENT.

A. Introduction.

As this Court has repeatedly made clear, any fact that increases the penalty for a crime beyond the proscribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. See e.g., *Blakley v. Washington*, 542 U.S. 296, 301, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). The Court has specifically applied this constitutional mandate in the death penalty context as related to the finding of aggravating factors necessary for the imposition of the death penalty. See *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

Despite the Court's clear authority in this area, California, with the largest death row in the nation has repeatedly decided that its death penalty law does not offend the Fifth or Fourteenth Amendments to the extent that it permits a trier of fact to impose a sentence of death without finding the existence of factors in aggravation beyond a

reasonable doubt. See, e.g., *People v. Huggins*, 38 Cal.4th 175, 250-251, 131 P.3d 995, 41 Cal.Rptr.3d 593. In light of California's position, certiorari is appropriate in this case to redress the constitutional violations suffered by hundreds of California death-row inmates during their penalty phase proceedings which resulted in sentences of death. Because this case is an ideal one for resolving the important question presented, this Court should grant certiorari and hold that California's DPL violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the extent it permits the imposition of the death penalty in the absence of a unanimous finding that the state proved aggravating factors against the defendant beyond a reasonable doubt.

B. California's DPL

The trial court's instructions to the jury comported with California's DPL. The People of California adopted the state's death penalty law ("DPL") through an initiative measure approved in 1978. (See e.g., Cal. Penal Code §§ 190, 190.1.) The DPL subjects a defendant to the death penalty after he has suffered a first degree murder conviction with at least one special circumstance. (Cal. Penal Code §§ 190.2(a), 190.3.) Once the trier of fact has found that one or more special circumstances exist, the court must hold a separate hearing to determine whether the defendant's punishment will be death or life imprisonment without the possibility of parole. (Cal. Penal Code § 190.2(a), 190.3, 190.4(a).) During the penalty hearing, the parties may present evidence "as to any matter relevant to aggravation, mitigation, and sentence...."[6] (Cal. Penal Code § 190.3.) In turn, the DPL provides that in determining the appropriate penalty, the trier of fact must take the following factors into

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[6] In California, aggravating factors are defined as "any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." *People v. Dyer*, 45 Cal.3d 26, 77, 753 P.2d 1, 246 Cal.Rptr. 209 (1988); CALJIC No. 8.88.

account, if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant was reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the

gravity of the crime even though it is not a legal excuse for the crime.

Cal. Penal Code § 190.3.

The trier of fact "shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in" section 190.3, and impose a sentence of death only if it concludes that "the aggravating circumstances outweigh the mitigating circumstances." *Ibid.* If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances, it must impose a sentence of life without the possibility of parole. *Ibid.*

Except for proof of unadjudicated criminal acts under factor (b), the DPL does not require that any aggravating factors be proven beyond a reasonable doubt. See, CALJIC 8.86, 8.87, 8.88; *People v. Brown* 33 Cal.4th 382, 401-402 (2004); *People v. Prieto* 30 Cal.4th 226, 275 (2003). Further, the DPL does not require juror unanimity regarding any aggravating circumstances used in the weighing process and any finding that such circumstances substantially outweigh the mitigating factors. CALJIC 8.86, 8.87

This Court should grant certiorari to hold that jurors must unanimously agree beyond a reasonable doubt on the facts that constitute the aggravating circumstances; that the aggravating circumstances outweigh any mitigating circumstances and that death is the appropriate punishment. Moreover, trial courts must give an appropriate instruction to that effect.

C. California Law Directly Contravenes This Court's Precedents And Must Be Corrected to Avoid Further Constitutional Violations.

1. The Failure to Require Aggravating Factors Be Proved Beyond A Reasonable Doubt Violated Petitioner's Fifth, Sixth, And Fourteenth Amendment Rights.

Other than the single prior criminal act evidence presented under DPL factor (b), the jury was not required to find any aggravating fact proven beyond a reasonable doubt. However, the Sixth and Fourteenth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Guadin*, 515 U.S. 506, 509-510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); see also *Mullaney v. Wilbur*, 421 U.S. 684, 698 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In re Winship*, 397 U.S. 358, 363-364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Where proof of a particular fact exposes the defendant to greater punishment than that available in the absence of such proof, that fact is an element of the crime which the Fifth and Sixth Amendments require to be proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Mullaney v. Wilbur*, 421 U.S. 684, 698, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *Specht v. Patterson*, 386 U.S. 605, 607, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967).

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence -

> - that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." (Citation omitted.) ..."[A] person accused of a crime . . . would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." (Citation omitted.)

In re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); see also *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979) ["the interests of the [criminal] defendant are of such magnitude that historically ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."].

In *Apprendi*, a factual finding under New Jersey's hate crime statute that defendant committed the charged possession of a firearm offense with the purpose to intimidate individuals because of race increased the statutory maximum penalty from between five and ten years imprisonment to between ten and twenty years imprisonment. The Court determined that since this factual finding increased defendant's penalty beyond the prescribed statutory maximum, it constituted an element of the offense to be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 490-492. As the Court held: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. *It is equally clear that such facts must be established by proof beyond a reasonable*

doubt." *Id.* at p. 490 (emphasis supplied), quoting *Jones v. United States*, 526 U.S. 227, 252-253, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).

In *Ring*, the Court applied the holding of *Apprendi* to Arizona's death penalty law. Under that law, the maximum punishment for first degree murder was life imprisonment unless the trial judge found beyond a reasonable doubt that one of ten statutorily enumerated aggravating factors existed. The Court held that Arizona's death penalty regime violated the rule announced in *Apprendi* since aggravating factors exposing a capital defendant to the death penalty must be proven to a jury beyond a reasonable doubt. *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Recalling *Apprendi*'s admonition that the relevant inquiry "'is one not of form, but of effect,'" the Court stated the following rule: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact -- no matter how the State labels it -- must be found by a jury beyond a reasonable doubt.[7] *Ring v. Arizona*, *supra*, 536 U.S. at p. 602, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494; see also *Blakely v. Washington*, 542 U.S. 296, 305, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) [invalidating Washington state's sentencing scheme to the extent it permitted judges to impose a sentence above the "standard range" or statutory maximum authorized by the jury's verdict by finding the existence of an aggravating factor by a preponderance of the evidence.].

The procedure for imposing a death sentence under

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[7] The Court's holding in *Ring* did not rest on the heightened protections that the Constitution affords in death penalty cases: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring v. Arizona*, *supra*, 536 U.S. at p. 589.

California's DPL violates defendants' due process right to proof beyond a reasonable doubt. Under California Penal Code §§ 190.2(a), 190.3, and 190.4(a), once the trier of fact has found that the defendant committed first degree murder with at least one special circumstance, the court must hold a separate penalty phase hearing to determine whether the defendant will receive a death sentence or a term of life without the possibility of parole. In considering whether to impose the death penalty, the trier of fact must consider a variety of enumerated circumstances in aggravation and mitigation. See Cal. Penal Code § 190.3. Since the trier of fact can only impose a sentence of death where the aggravating circumstances outweigh the mitigating circumstances, it must first find at least one factor in aggravation before imposing death. *Ibid.*

Pursuant to *Apprendi* and *Ring*, because the DPL's factors in aggravation operate as "the functional equivalent of an element of a greater offense," the Fifth and Fourteenth Amendments require that they be found by the trier of fact beyond a reasonable doubt. *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494, n. 19. Thus, just as the presence of the hate crime enhancement in *Apprendi* elevated defendant's sentence range beyond the prescribed statutory maximum, the presence of aggravating factors under the DPL elevate a defendant's sentence beyond the statutory maximum of life in prison to a sentence of death. Similarly, as in *Ring*, the maximum punishment a defendant may receive under the DPL for first degree murder with a special circumstance is life imprisonment; a death sentence is unavailable without a finding that at least one statutorily enumerated aggravating factor exists. Consequently, as the Court made clear in *Ring*, since it is the existence of factors in aggravation which expose California's capital defendants to the death penalty, those factors must be proven beyond a reasonable doubt in order to impose a constitutionally-valid death sentence.

Because no standard of proof is required as to those factors upon which a death verdict must rest, the imposition of a death sentence under the DPL -- as in this case -- violates defendant's constitutional guarantee to proof beyond a reasonable doubt.

Despite the similarities between the DPL and the sentencing schemes invalidated in *Apprendi* and *Ring*, the California Supreme Court has repeatedly held that aggravating factors, other than unadjudicated criminal acts, need not be proven beyond a reasonable doubt. See, e.g., *People v. Brown*, 33 Cal.4th 382, 401-402, 93 P.3d 244, 15 Cal.Rptr. 3d 624 (2004); *People v. Prieto*, 30 Cal.4th 226, 275, 66 P.3d 1123, 133 Cal.Rptr.2d 18 (2003). The court has justified its position under the theory that "the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another."[8] *People v. Prieto*, *supra*, 30 Cal.4th at p. 275. In accord with the California Supreme Court's precedents in this area, the trial court in this case refused to instruct the jury that it could only consider a factor in aggravation if it found that the evidence established the existence of the factor beyond a reasonable doubt. (17 R.T. 2809-2810; 5 C.T. 1294-1307; 6 C.T. 1565-1664.)

California stands alone in refusing to require the state

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[8] The court in *Black* found that neither *Ring* nor *Blakely* rendered California's Determinate Sentencing Law unconstitutional because "[t]he judicial factfinding that occurs during [the selection of an upper term sentence] is the same type of judicial factfinding that traditionally has been part of the sentencing process." *People v. Black*, 35 Cal.4th 1238, 1258, 113 P.3d 534, 29 Cal.Rptr.3d 740 (2005). Subsequently the United States Supreme Court held California's Determinate Sentencing Law unconstitutional in *Cunningham v. California*, 127 S.Ct. 856, 2007 U.S. LEXIS 1324 (2007).

to prove aggravating factors beyond a reasonable doubt before the trier of fact may impose a death sentence. Of the 37 jurisdictions in the nation with a death penalty, the statutes of 30 states and the federal system specifically provide that such aggravating factors must be proven beyond a reasonable doubt.[9] The statutes of four additional states contemplate the introduction of evidence in aggravation, but are silent on the standard of proof by which the state must prove this evidence to the tier of fact.[10] However, with the exception of Oregon's Supreme Court, which has not yet faced the issue, the supreme courts of these jurisdictions have explicitly determined that the trier of fact must find factors in aggravation beyond a reasonable doubt before using them to impose a sentence of death.[11]

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[9] See Ala. Code § 13A-5-45(e); Ariz. Rev. Stat. Ann. § 13-703(B); Ark. Code Ann. § 5-4-603; Colo. Rev. Stat. § 18-1.3-1201(1)(d); Del. Code Ann., Tit. 11 § 4209(c)(3)a.1; Ga. Code Ann. § 17-10-30(c); Idaho Code §19-2515(3)(b); Ind. Code Ann. § 35-50-2-9(a); Ill. Comp. Stat., Ch. 720, § 5/9-1(f); Ky. Rev. Stat. Ann. § 532-025(3); La. Code Crim. Proc. Ann. art.905.3; Md. Crim. Law Code Ann. § 46-18-305; Mo. Rev. Stat. Ann. § 565-032.1(1); Neb. Rev. Stat. § 29-2520(4)(f); New. Rev. Stat. § 175-554(4); N.H. Rev. Stat. Ann. § 630:5-iii; N.J. Stat. Ann. 2C:11-3c(2)(a); N.M. Stat. Ann § 31-20A-3; N.C. Gen. Stat. § 15A 2000(c)(1); Ohio Rev. Code Ann. § 2929-04(B); Okla. Stat. Ann., Tit. 21, § 701.11; 42 Pa. Cons. Stat. § 9711 (c)(1)(iii); S.C. Code Ann. § 16-3-20(A); S.D. Codified Laws Ann. § 23A-27A-5; Tenn. Code Ann. § 39-13-204(f); Tex. Crim. Proc. Code Ann. § 37.071(c); Va. Code Ann. § 19.2-264.4(C); Wyo. Stat. § 6-2-102(d)(i)(A), (e)(i); 18 U.S.C.A. § 3593(c).

[10] See Conn. Gen. Stat. § 53a-46a(c); Fla. Stat. § 921-141(1), (2)(a); Ore. Rev. Stat. § 163-150(1)(a); Utah Code Ann. § 76-3-207(2)(a)(iv). Washington state's death penalty law does not mention aggravating factors, but requires that before imposing a sentence of death, the trier of fact must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. Wash. Rev. Code Ann. § 10.95.060(4). New York declared its death penalty statute unconstitutional in 2004, *People v. LaValle*, 3 N.Y.3d 88, 783 N.Y.S.2d 485, 817 N.E.2d 341 (N.Y. 2004), and had not since revived it.

[11] See *State v. Rizzo*, 226 Conn. 171, 180, 833 A.2d 363, 375 (Conn. 2003); *State v. Steele*, 921 So.2d 538, 540 (Fla. 2005); *State v. Gardner*,

2. The Failure to Require Juror Unanimity As To What Facts Were True And Sufficiently Aggravating To Support A Vote For Death Violated the Fifth, Sixth, Eighth, and Fourteenth Amendments.

In its recent decisions holding the Sixth Amendment jury-trial right applicable to sentencing findings, this Court has noted that unanimity is one of the bedrock requirements underlying the Sixth Amendment right:

> "[T]o guard against a spirit of oppression and tyranny on the part of the rulers," and "as the great bulwark if [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the **unanimous** suffrage of twelve of [the defendant's] equals and neighbours...." 4 W. Blackstone, Commentaries on the Law of England 343 (1769).

(*Apprendi v. New Jersey*, *supra*, 530 U.S. at 477 (emphasis added; brackets in original). Accord *Blakely v. Washington*, 542 U.S. 296, 313, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). See also *People v. Griffin*, 33 Cal.4th 536, 594-595, 15 Cal.Rptr.3d 743, 93 P.3d. 344 (2004) ["In *Apprendi*, the court held that the Fourteenth Amendment's due process clause requires the state to submit to a jury, and prove beyond a reasonable doubt to the jury's **unanimous** satisfaction, every fact, other than a prior conviction, that

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947 P.2d 630, 647 (UT 2002); *State v. Brown*, 607 P.2d 261, 273 (UT 1980).

increases the punishment for a crime beyond the maximum otherwise prescribed under state law"; emphasis added].) As the Court explained in *Apprendi*, where a sentencing factor authorizes a punishment beyond the maximum authorized for the underlying offense, "it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." (*Id.* at p. 494, fn. 19.)

Relying on *Walton v. Arizona,* 497 U.S. 639, 647-649, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), this Court excepted its holding in *Apprendi* from capital sentencing schemes that required judges to find specific aggravating factors after a jury found the defendant guilty of a capital crime. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 496.) Subsequently in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), this Court overruled *Walton* to the extent that it allowed a sentencing judge, sitting without a jury, to make factual findings necessary for imposition of a death sentence. (*Id.* at p. 2443.) *Ring* further held that *Apprendi* was fully applicable to all such findings whether labeled "sentencing factors" or "elements" and whether made at the guilt or penalty phases of trial. (*Ibid.*)

The California Supreme Court has rejected the applicability of *Apprendi* and *Ring* to California's death penalty law on the ground that, after the jury has found any special circumstance allegations true beyond a reasonable doubt, "death is no more than a prescribed statutory maximum for the offense." *People v. Prieto,* 30 Cal.4th 226, 263 133 Cal.Rptr.2d 18, 66 P.3d 1123 (2003), quoting *People v. Anderson,* 25 Cal.4th 543, 589, fn. 14, 106 Cal.Rptr.2d 575, 22 P.3d 347 (2001), emphasis deleted; *People v. Snow,* 30 Cal.4th 43, 126, fn. 32, 132 Cal.Rptr.2d 271, 65 P.3d 749 (2003).

However, in *Cunningham v. California*, 127 S.Ct. 856, 860, 2007 U.S. LEXIS 1324 (2007), this Court ruled: "[T]he relevant 'statutory maximum,'" this Court has clarified, "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." Citing to *Blakely v. Washington* 542 U.S. 296, 303-304, 124 S.Ct. 2531; 159 L.Ed.2d 403 (2004), (emphasis in original).) Therefore, the California's Supreme Court's finding that death is the prescribed maximum under the DPL is constitutionally incorrect.

In Cunningham, this Court was addressing California's determinate sentencing law ("DSL"). Pursuant to the DSL, the sentencer (in *Cunningham*, the court) was obliged to sentence Cunningham to a prescribed middle term, unless the judge found one or more additional "circumstances in aggravation."[12] In *Cunningham* the judge found six aggravating facts and one mitigating fact. Therefore, the judge sentenced Cunningham to the upper term. The California Court of Appeals affirmed. The California Supreme Court denied review. This Court reversed the appeals' judgment because the upper term was the result of additional fact-finding by the judge, which violated Cunningham's right to a jury trial. (*Cunningham v. California, supra*, 127 S.Ct. at p. 860.)

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[12] The applicable DSL provision, California Penal Code section 1170, subdivision (b), states: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Court rules adopted to implement the DSL define "circumstances in aggravation" as facts that justify the upper term. (Cal. Rule of Court, Rule 4.405(d).) Those facts must be established by a preponderance of the evidence. (Cal. Rule of Court, Rule 4.420(b), n. 6.)

Cunningham is apposite to the case at bar. In petitioner's case the jury's guilt-phase verdict left the jurors with two possible penalties, death or life without the possibility of parole. In order to sentence petitioner to death the jurors were required to find that aggravating circumstances substantially outweighed mitigating circumstances. (CALJIC 8.88.) An aggravating factor or circumstance was defined as "**any fact**, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC 8.88, emphasis added.) Therefore, unless additional facts were found by the jury that substantially outweighed the mitigating facts, the prescribed sentence was life without parole.

Cunningham was merely the logical extension of *Apprendi*. A sentence of death under the DPL is the "functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494, fn. 19. Likewise, *Apprendi* is the logical extension of *Blakely*. Life without the possibility of parole was the "statutory maximum" sentence because it was the maximum sentence that could be imposed based on the jury's verdict alone. *Blakely v. Washington*, *supra*, 542 U.S. at p. 303.

D. This Case Presents An Excellent Vehicle for Considering The Question Presented.

At least two aspects of this case make it an excellent vehicle for deciding whether California's DPL violates the Fifth and Fourteenth Amendments by permitting the trier of fact to impose a death sentence without having found aggravating factors beyond a reasonable doubt. First, the case is on direct review from the California Supreme Court and petitioner unambiguously presented the federal

constitutional claim to that court, which denied the claim on its merits. Thus, there is no procedural impediment to this Court's considering the question presented.

Second, there is every reason to believe that the constitutional violation was not harmless. The failure to require jury unanimity as to aggravating factors, including the circumstances of the crime, before they can be used in the weighing process and unanimity as to their conclusion that aggravators substantially outweigh mitigators is reversible per se. *Ring v. Arizona*, *supra*, 122 S.Ct. 2443; *Sullivan v. Louisiana*, 508 U.S. 275, 279-281, 113 S.Ct. 2078, 124 L.Ed.2d 182 ["misdescription of the burden of proof ... vitiates all the jury findings"].

Alternatively, without written findings as to which factors the jury relied upon the State cannot show beyond a reasonable doubt that the error did not contribute to the penalty verdict. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). It also cannot be found that the error had "no effect" on the jury's sentencing determination and this met "the standard of reliability that the Eighth Amendment requires." *Caldwell v. Mississippi*, 472 U.S. 320, 341, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) (plur. opn. of Marshall, J.). Further, the state supreme court squarely rejected petitioner's claim on the merits, without any finding of harmless error. *People v. Bell*, *supra*, 40 Cal.4th at p. 620-621. Consequently, this Court should grant the Petition for Writ of Certiorari.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

DATED: June 26, 2007

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Filed 2/15/07

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

S038499

v.

San Diego County

STEVEN M. BELL, Super. Ct. No. CR133096

Defendant and Appellant.

Defendant Steven M. Bell was convicted of first degree murder with a robbery-murder special circumstance (Pen. Code, §§ 187, 189, 190.2, subd. (a)(17)) and sentenced to death for the 1992 killing of Joey Anderson. On automatic appeal, we affirm the judgment in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

Guilt Phase Trial

Prosecution Evidence

On June 4, 1992, defendant was living at the San Diego home of his girlfriend, Deborah Mitchell, with Mitchell and her 11-year-old son, Joey Anderson. On that morning, after Mitchell left for work and Joey went to school, defendant walked to a local government office and obtained a S 111 assistance check. According to defendant's statement to police, he cashed the check and, in the early afternoon, used the cash

to buy crack cocaine, which he smoked with several acquaintances. Around 3:00 p.m., defendant ran out of money and returned to Mitchell's house with the plan of taking items to sell in order to buy more crack.

According to defendant's statement, he expected Joey still to be at school. In fact, however, Joey had come home from school earlier than usual and was watching television in his mother's bedroom. After getting a shopping cart from behind the building, defendant entered the bedroom intending to take the television. Seeing Joey, defendant went to the kitchen, took a knife from a drawer, and returned to the bedroom. There he stabbed Joey in the back and, when Joey fell to the floor, stabbed him several more times and stomped on Joey's head with his foot.

After killing Joey, defendant took the television and a "boom box" from Joey's room and put both in the shopping cart. Defendant wrapped the bloody knife in a plastic bag and covered the shopping cart's contents with a blanket. He then left with the cart, waving to a neighbor as he passed. He dropped the knife on a trash pile, sold the television and boom box, and used the proceeds to buy more crack cocaine, which he smoked with a woman companion.

Mitchell discovered her son's body when she returned from work. Joey was lying on the bedroom floor near the television stand, his partly eaten lunch nearby. According to the medical examiner, Joey had multiple stab wounds in the abdomen, chest and back (including a seven-inch-deep stab wound to the chest that caused fatal damage), a skull fracture, and bleeding or bruising of the brain.

About 10:45 the next morning, defendant approached a police officer who was directing traffic. Showing the officer

a newspaper article about Joey's killing, defendant identified himself and said he did not stab the boy. In his initial interview with homicide detectives at the station, defendant admitted taking the television and boom box in order to buy drugs, but denied Joey was at home when he did so.

In a second interview, defendant admitted killing Joey. He said he did not know why he had killed Joey instead of just taking the television; he had gotten along well with Joey and was not angry at the boy. Defendant said he "just flipped." As he got the knife from the kitchen, he felt "so evil," as if "something's pushing me to do this," and he "ask[ed] the Lord's help."

Defense Evidence

The defense did not dispute that defendant had taken the television and boom box and had killed Joey, but sought, through expert testimony regarding defendant's mental health and drug use, to cast doubt on the existence of a connection between the thefts and the killing.

A toxicologist testified that a sample of defendant's urine, taken at the time of his arrest the day after the crimes, showed the presence of benzoylecgonine, a cocaine metabolite, in a concentration greater than 6,000 nanograms per milliliter, the upper calibration limit of the machine used for this test. A sample of defendant's blood contained 92 nanograms per milliliter of benzoylecgonine, but no cocaine itself.

A pharmacologist testified the measured blood level of benzoylecgonine would be considered a "moderate quantity" if the sample was taken immediately after smoking cocaine or would indicate a "much larger" cocaine dose if the crack cocaine had been smoked many hours earlier, as was suggested

by the fact that no actual cocaine was found in the blood sample. The measured urine concentration indicated a level of cocaine consumption that may have been either "relatively high" or "enormous," depending on how much greater than 6,000 nanograms per milliliter the urine concentration was. In answer to a hypothetical question based on the facts outlined in defendant's statements to the police, the pharmacologist opined that the observed blood concentration of benzoylecgonine was consistent with the hypothesized timing and amount of defendant's cocaine consumption.

Dr. David Smith, a specialist in addiction medicine and clinical toxicology, testified to the effects of crack cocaine on the body and mind. These can include violent "rage reaction[s]," "cocaine psychosis" (a paranoid schizophrenic-like reaction found with long-term repeated use), and the manifestation of a preexisting personality disorder. Based on his personal evaluation of defendant, his review of police, toxicological and psychological reports, and defendant's recorded confession, Smith opined defendant's killing of Joey was neither a rage reaction nor a classic cocaine psychosis. Instead, he believed, defendant's crack cocaine use precipitated a psychotic "decompensation" episode in which defendant experienced "dissociation" from his own actions. Defendant was prone to such a reaction because of his borderline personality disorder (a diagnosis Smith drew from his own observations and from psychological reports provided to him). According to Smith, a person with borderline personality disorder—a disorder associated with "very dysfunctional child rearing"—has "a relatively thin level of functioning, but underneath it, for example, has a psychotic personality." Such a person has reduced impulse control and an increased incidence of dissociative reactions. Under the influence of drugs, the person can have "a break with reality in which the individual depersonalizes, ... seeing themselves doing

something as if it's somebody else."

Smith found defendant's explanation of Joey's killing consistent with a past episode, occurring in 1981 when defendant was 15, in which defendant had stabbed and sodomized a 13-year-old schoolmate. In both cases, defendant (whose borderline personality disorder would already have existed at the earlier age) was using drugs (PCP in the 1981 episode). In both cases, defendant attacked a nonthreatening boy with a knife. In both cases, according to Dr. Smith, defendant experienced depersonalization and a sense that someone or something was telling him to commit the violent acts.

Richard Levak, a clinical psychologist, interviewed defendant, administered the Minnesota Multiphasic Personality Inventory to him, and reviewed materials from the current and 1981 incidents. Like Smith, Levak diagnosed defendant as having borderline personality disorder. A person with this severe disturbance in identity can function well in a structured situation, but when confronted with even minor stressors can experience brief, transitory losses of contact with reality. The disorder originated in defendant's childhood situation: his mother provided for him but did not like him or show him affection; defendant stuttered, which reminded his mother of defendant's father, who had left her; defendant's stuttering made his mother impatient and angry; defendant's stepfather drank and physically abused him, alternating the abuse with episodes of tenderness; defendant suffered ridicule at school because of his stutter and the "preppy" way his mother dressed him. This combination of circumstances caused "a completely damaged self-identity, ... an escape into fantasy, ... an attempt to shut down all emotions ... and this confusion of sexuality and aggression." In response, defendant began drinking alcohol by age nine and using other drugs by early adolescence.

According to Levak, defendant identified with Joey, who was having trouble at school and, as a consequence, was sometimes whipped by his mother. On the day of the crimes, defendant, severely stressed by his cocaine use, unexpectedly encountered Joey at home. "And then I think that having a lot of mixed feelings, that he has a temporary psychotic break, a lot of old feelings of anger and rage from his own childhood are suddenly erupted, and he then feels this compulsion to kill Joey, and in the process, I believe, he's killing a part of himself." The 1981 incident, Levak opined, was "eerily similar"—there too defendant, under the influence of drugs and having "experienced a life in which violence and affection were linked," found his feelings of affection for the victim "too much for him to deal with" and assaulted the victim in a brief psychotic episode.

Prosecution Rebuttal Evidence

A toxicologist called by the prosecutor disputed the defense pharmacologist's analysis of the results of defendant's drug tests. He disagreed with the defense expert's statement that a urinary benzoylecgonine concentration greater than 6,000 nanograms per milliliter suggested the subject had smoked more than a single hit of crack cocaine. He stated the defense expert had used an incorrect value for the half-life of benzoylecgonine in answering the hypothetical question regarding blood levels of that chemical. Using the correct half-life value, he opined the hypothetical person's blood-benzoylecgonine concentration would have been around 890 nanograms per milliliter, rather than the 90 nanograms per milliliter measured in defendant's blood the day after the crime. Calculating backward from the measured blood concentration, the prosecution toxicologist found that concentration could have resulted from smoking about 100 milligrams of crack cocaine (about one hit) at 1:00 p.m. the day before the blood

sample was taken.

A psychiatrist and a psychologist called by the prosecutor both disagreed with the opinions of the defense experts that defendant had killed Joey during a brief psychotic break with reality caused by borderline personality disorder and triggered by crack cocaine use. According to the prosecution psychiatrist, a cocaine-induced break with reality can occur, but only in "extreme situations ... in terms of dose and duration of exposure," as when a person uses cocaine for days on end without eating or sleeping. The psychologist noted that borderline personality disorder commonly involves suicidal or self-mutilatory acts or gestures, which were not present in defendant's history, and opined that to the extent defendant had a personality disorder it was "a mixed personality disorder with predominantly anti-social features." As to a break in contact with reality during the killing, the psychologist observed that before and after the killing defendant had acted in a rational manner; he opined that psychotic decompensation "doesn't just happen with the flick of a switch." He would also expect a cocaine-triggered psychotic episode to occur when the intoxication from the cocaine was at its greatest, rather than "several hours later" when defendant killed Joey.

The prosecution psychologist also observed that defendant, when he initially confessed to the 1981 attack on his schoolmate, did not mention having heard voices directing him to attack the victim, though he later told a psychologist he had. The videotape of defendant's initial 1981 interview with a Manhattan prosecutor was played for the jury. In that interview, defendant said that he was drinking whisky with three friends, including the victim. When one of them got sick, they took him to the hospital. In the late evening, defendant was alone with the victim in the victim's bedroom. Defendant

went to the kitchen for a drink of water, but also took a large kitchen knife from a drawer and brought it back to the bedroom. When the victim went to turn off the stereo, defendant stabbed him in the back. The victim fell onto his bed and asked defendant to take him to the hospital. Instead, defendant got some Vaseline from the bathroom and, after pulling down the victim's pants and underpants, put Vaseline on his anus and sodomized him. Defendant then departed, leaving the victim undressed with the knife still in him.

Penalty Phase Trial

Prosecution Evidence

In aggravation, the prosecution presented evidence of the 1981 offense's impact on its victim and of the impact of Joey's killing on his family.

The 1981 victim testified that after an evening of drinking alcohol and smoking marijuana, he was alone with defendant in the victim's bedroom. Defendant said he had dropped his keys behind the bed and asked the victim to get them. When the victim leaned over, defendant stabbed him in the back with a butcher knife. The knife penetrated through the victim's body, emerging at his chest. He blacked out; when he came to, he was on the floor, paralyzed. By the time of trial he had recovered some use of his legs, though he still used a wheelchair as well. As a result of the attack, he lost a lot of school time and never graduated. He had no job and depended on government payments.

Deborah Mitchell, Joey's mother, briefly described her life with Joey before his death. After his killing, she could not return to their home and moved away from San Diego, where most of her family lived, to the San Francisco Bay Area, where

her daughter lived. At the time of trial, she was in therapy and a support group but still felt great pain from the loss of Joey. Mitchell's father described his grandson, with whom he was close, as a talkative and playful boy. After Joey's death, Mitchell was very disturbed and became more distant from her family, apparently feeling the family held her responsible for Joey's killing.

Defense Evidence

Several members of defendant's family—two aunts, a cousin, and his sister Lisa—described his childhood and immediate family, and in particular his parents' emotional neglect and physical abuse. Defendant's mother was reserved and unaffectionate. She did not hug or show affection to defendant, and as a small child defendant was unaccustomed to being held or kissed. When defendant was two years old, he was hospitalized for close to two weeks for pneumonia; his mother visited him only once in that time. Defendant began stuttering when he was a little older; his mother was annoyed and told him to "say what you have to say or shut up." His mother's impatience caused defendant to withdraw as if he were ashamed. Eventually defendant's communication with his mother decreased; Lisa, who was a few years older, would speak for him because he was too nervous.

Defendant's father was an intravenous drug user who stole from the family home. Defendant's father and mother divorced when defendant was two or three years old and after that, contact with his father was rare. Defendant's mother remarried when defendant was six or seven years old. To discipline defendant, his stepfather beat him once or twice a week, using his hands, a belt or an electric cord. He also sexually molested Lisa repeatedly from when she was 11 years old until she joined the Army and left home at 17.

A number of witnesses testified to defendant's good behavior while he was confined at the Harlem Valley Youth Detention Center for the 1981 offense. Defendant was somewhat passive, but friendly, intelligent and trustworthy; he worked for years in the facility kitchen together with the women employees, who came to regard him as a friend or little brother; he was not involved in violent incidents and earned his general equivalency diploma and some college credits. Unlike other residents' families, defendant's family did not visit him at Harlem Valley.

The director of Theatre Rehabilitation for Youth (TRY) testified to defendant's participation in TRY programs both during and after his confinement at Harlem Valley. During his confinement, defendant participated in TRY workshops and shows at Harlem Valley, acted in a touring show, and wrote poetry and portions of scripts for the shows. He became more confident and did not stutter on stage. In one scene defendant wrote about himself, he asked: "But what if I can't forgive myself?" The director felt that defendant became like a son to him. He hired defendant after his release from custody to operate sound and lighting equipment for TRY's touring show. Although sometimes appearing strung out from drug use, defendant worked hard and responsibly for some months, but was dismissed when he falsely reported his paycheck missing. After his dismissal, defendant voluntarily worked a week without pay to repay what he had taken.

A sociologist described Lexington Houses, the Manhattan public housing project where defendant grew up, and the surrounding neighborhood of East Spanish Harlem. The area had been a drug-selling zone for at least 30 years; in the 1980's, it was flooded with crack cocaine.

The admissions director of a private junior college in

San Diego testified that defendant enrolled to study accounting in 1990. In his first quarter of classes he got straight A's, but in the second quarter he seemed troubled and eventually quit attending. He returned in May 1992 and reenrolled, planning to start classes in August.

A correctional consultant testified to the maximum security conditions under which life prisoners are held in California prisons. He also opined, based on defendant's history in confinement, that defendant would be an excellent prisoner if sentenced to life without the possibility of parole.

A psychologist who analyzed defendant's responses to the Minnesota Multiphasic Personality Inventory and reviewed materials from the 1981 and charged offenses opined (in accord with the guilt phase defense experts) that defendant had borderline personality disorder and that Joey's killing had "all the hallmarks" of a transient psychotic episode.

Prosecution Rebuttal Evidence

A probation officer testified that in 1991 she had discussed the 1981 incident with defendant. He said that while he and a friend were smoking PCP, "his friend grabbed a butcher knife, but he stabbed his friend first." Defendant also said he and the victim were still friends and did not mention that he had sodomized the victim after stabbing him. A deputy sheriff at the San Diego County jail testified defendant was kept in segregation from the main population while awaiting trial.

Procedural History

In an information filed August 12, 1992, defendant was charged with murder (count 1: Pen. Code, § 187, subd. (a)),[1] with an allegation of personal use of a deadly weapon (§ 12022, subd. (b)) and special circumstance allegations of murder in the commission of robbery and burglary (§ 190.2, subd. (a)(17)); residential robbery (count 2: §§ 211, 212.5) with personal use and great bodily injury allegations (§§ 12022, subd. (b), 12022.7); and residential burglary (count 3: §§ 459, 460) with personal use and great bodily injury allegations (§§ 12022, subd. (b), 12022.7). The burglary charge, its accompanying allegations, and the burglary-murder special-circumstance allegation were dismissed before trial on defendant's motion under section 995.

On November 22, 1993, the jury found defendant guilty of first degree murder and robbery, and found true the robbery-murder special-circumstance allegation and the allegations of personal use of a deadly weapon and infliction of great bodily injury. On December 17, 1993, the jury returned a verdict of death. On March 7, 1994, having denied the automatic motion to reduce the penalty and defendant's motion for a new trial, the trial court sentenced defendant to death on count 1 and to a 10-year determinate sentence on count 2, the latter sentence being stayed under section 654.

The appeal to this court is automatic. (Cal. Const., art. VI, § 11; § 1239, subd. (b).)

Discussion

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[1] All further unspecified statutory references are to the Penal Code.

I. *Wheeler-Batson* Motions: Existence of Prima Facie Case

Defense counsel made three motions under *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*), claiming the prosecutor had used peremptory challenges to deliberately exclude African-American women, people of Filipino origin or descent, and lesbians. The trial court found no prima facie case of discrimination as to any of these groups, a set of findings defendant contends was error. We conclude the trial court was correct.

Factual Background

When the prosecutor excused Prospective Juror Gwendolyn J., defense counsel made a *Wheeler-Batson* motion on the basis of her race, arguing that none of her questionnaire answers showed "favor either way." The trial court observed that the prosecutor had challenged only one of the three African-Americans currently on the jury panel, with four more remaining in the group still subject to peremptory challenge, and found no prima facie case of exclusion on the basis of race.

Later, when the prosecutor peremptorily challenged another African-American woman, Lisa J.-S., as an alternate juror, defense counsel claimed the prosecutor was "using group bias to exclude African-American women," a cognizable group for *Wheeler* purposes under *People v. Motton* (1985) 39 Cal.3d 596, 605–606. The court noted that a third African-American woman, Helen L., remained on the panel and ascertained that the prosecutor did not intend to challenge her. The court also noted that the jury panel included three African-American men; that defendant was not a member of the group to which defense

counsel claimed group bias was being applied; and indeed that the group, African-American women, "is actually more closely related to the victim than to the defendant," viewing Joey's mother as a victim of defendant's alleged crimes. In those circumstances, the court found, the prosecutor's excusal of two out of three African-American women did not create a prima facie case of intentional discrimination.

Defense counsel also contended the prosecutor's peremptory challenges to Prospective Jurors Charles B. and Saldy P. were motivated by "group bias against Filipino Americans." The trial court agreed both men were Filipino-Americans and assumed, for purposes of the motion, that Filipino-Americans are a cognizable group under *Wheeler* and *Batson*. The court observed, however, that membership in that group was not always easy to determine, as the questionnaire used did not ask potential jurors to identify their ethnic group; at least two other members of the jury panel, in the court's view, could have been Filipino-Americans. The court also noted that neither defendant nor any victim in the case was Filipino- or Asian-American. In those circumstances, the court found, the prosecutor's excusal of two Filipino-Americans did not create a prima facie case of group bias.

Finally, defense counsel claimed the prosecutor had exercised group bias against lesbians in peremptorily challenging Prospective Jurors Francene B. and Lynne W. Asked for the factual basis to believe Francene B. was a lesbian, counsel pointed to "her physical appearance" and the fact she had participated in a gay rights march, "is involved with other feminist issues and reads women's literature." In the case of Lynne W., counsel pointed to her "non-traditional job" (as a carpenter and locksmith) and that she "reads women's issues." The trial court, finding no basis for concluding either woman was a lesbian, denied the *Wheeler* motion.

In a motion for new trial, the defense renewed its *Wheeler-Batson* motions with regard to African-American women and Filipino-Americans. The trial court repeated its conclusion that no prima facie case had been made as to either group, stating that the record did not show a "strong likelihood" of discrimination.

Analysis

"A prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against 'members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds'—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. (*Wheeler, supra*, 22 Cal.3d at pp. 276–277; see *People v. Griffin* (2004) 33 Cal.4th 536, 553.) Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution. (*Batson, supra*, 476 U.S. at p. 88; see also *People v. Cleveland* (2004) 32 Cal.4th 704, 732.)" (*People v. Avila* (2006) 38 Cal.4th 491, 541.)

"The United States Supreme Court has recently reaffirmed that *Batson* states the procedure and standard to be used by trial courts when motions challenging peremptory strikes are made. 'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful

racial discrimination." [Citation.]' (*Johnson v. California* (2005) 545 U.S. 162, [168], fn. omitted.)" (*People v. Avila, supra*, 38 Cal.4th at p. 541.) We have endorsed the same three-part structure of proof for state constitutional claims. (*People v. Snow* (1987) 44 Cal.3d 216, 222; *Wheeler, supra*, 22 Cal.3d at pp. 280–282.)

The trial court's statement, in denying defendant's new trial motion, that it failed to find a "strong likelihood" of discrimination suggests the court may have used a standard for the prima facie case that was later found too demanding under *Batson*. "[O]ur *Wheeler* decision ... alluded to a 'reasonable inference' of group bias as a basis for a prima facie showing and also called for the defendant to establish a 'strong likelihood' that a juror has been peremptorily challenged on the basis of group bias. (*Wheeler, supra*, 22 Cal.3d at pp. 280, 281.) Our subsequent decision holding that both of the quoted terms were essentially the same as the *Batson* standard, and that a prima facie showing called for a demonstration that it was 'more likely than not' that group bias accounted for the challenge, was disapproved in *Johnson* [*v. California, supra*, 545 U.S. at pp. 169–172] (reversing *People v. Johnson* (2003) 30 Cal.4th 1302)." (*People v. Cornwell* (2005) 37 Cal.4th 50, 73.)

Even assuming the trial court applied the wrong standard, however, reversal is not necessarily required. Where it is unclear whether the trial court applied the correct standard, we review the record independently to "apply the high court's standard and resolve the *legal* question whether the record supports an inference that the prosecutor excused a juror" on a prohibited discriminatory basis. (*People v. Cornwell, supra*, 37 Cal.4th at p. 73; accord, *People v. Avila, supra*, 38 Cal.4th at p. 554.)

Though proof of a prima facie case may be made from any information in the record available to the trial court, we have mentioned "certain types of evidence that will be relevant for this purpose. Thus the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, ... the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention." (*Wheeler, supra*, 22 Cal.3d at pp. 280–281, fn. omitted; see also *Batson, supra*, 476 U.S. at pp. 96–97 [in assessing a prima facie case, the trial court should consider "all relevant circumstances," including "a 'pattern' of strikes against black jurors" and "the prosecutor's questions and statements during *voir dire* examination"]; *U.S. v. Grandison* (D.Md. 1988) 721 F.Supp. 743, 747 [that the prosecutor did not engage in "desultory or half-hearted questioning" of excused jurors is a factor against prima facie showing]; *United States ex rel. Henderson v. Page* (N.D.Ill. 2000) 2000 WL 1466204, p. *13 ["heterogeneity of the stricken black venire members" is relevant *Batson* circumstance]; *United States ex rel. Kyles v. O'Leary* (N.D.Ill. 1986) 642 F.Supp. 222, 228 [defendant's membership in group allegedly excluded, together with victim's membership in majority group, is relevant *Batson* circumstance].)

We agree with the trial court that the defense did not make a prima facie case that Gwendolyn J. and Lisa J.-S. were challenged because they are African-American women. As noted, African-American women constitute a cognizable group under *Wheeler*. (See *People v. Motton, supra*, 39 Cal.3d at pp. 605–606.) While the prosecutor did excuse two out of three members of this group,[2] the small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible. "[E]ven the exclusion of a single prospective juror may be the product of an improper group bias. As a practical matter, however, the challenge of one or two jurors can rarely suggest a *pattern* of impermissible exclusion." (*People v. Harvey* (1984) 163 Cal.App.3d 90, 111.)[3] Nor did

[2] Defendant argues the third African-American woman, Helen L., who served as an alternate, should not be considered in our analysis because had the prosecutor challenged her he would have had to accept a different alternate "with strong anti-death penalty feelings." The only record evidence cited for this proposition, however, is defense counsel's own assertion of it during a new trial hearing. Nor do we agree with defendant that the trial court effectively told the prosecutor "he would have to accept" Helen L. The trial court observed that if the prosecutor did not challenge Helen L. "that would make a difference" in its prima facie case analysis because "two out of three is different than two out of two," but the court never indicated it would grant the *Wheeler-Batson* motion, or even find a prima facie case, if the prosecutor challenged Helen L.

[3] To be sure, the ultimate issue to be addressed on a *Wheeler-Batson* motion "is not whether there is a pattern of systematic exclusion; rather, the issue is whether a particular prospective juror has been challenged because of group bias." (*People v. Avila, supra*, 38 Cal.4th at p. 549.) But in drawing an inference of discrimination from the fact one party has excused "most or all" members of a cognizable group (*Wheeler, supra*, 22 Cal.3d at p. 280), a court finding a prima facie case is necessarily relying on an apparent pattern in the party's challenges. Although circumstances may be imagined in which a prima facie case could be shown on the basis of a single excusal, in the ordinary case, including this one, to make a prima facie case after the excusal of only one or two members of a group is very difficult. (Accord, *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1198.)

the prosecutor use "a disproportionate number of his peremptories against the group" (*Wheeler, supra*, 22 Cal.3d at p. 280); only two of the prosecutor's 16 peremptory challenges were exercised against African-American women.[4] Defendant does not contend Gwendolyn J. and Lisa J.-S. shared only the characteristic of being African-American women and were otherwise "as heterogeneous as the community as a whole." (*Wheeler*, at p. 280.) Nor does he assert the prosecutor engaged these prospective jurors in particularly "desultory" questioning on voir dire. (*Id.* at p. 281.)[5] Lastly, defendant is not a member of the group allegedly excluded, African-American women. Indeed, as the trial court observed, one of the victims of defendant's crimes, Joey's mother, was an

[4] A more complete analysis of disproportionality compares the proportion of a party's peremptory challenges used against a group to the group's proportion in the pool of jurors subject to peremptory challenge. Here the prosecutor used two of his 16 peremptory challenges, or 12.5 percent, against African-American women, while of the 47 prospective jurors who were subject to peremptory challenge, three, or about 6.4 percent, were African-American women. Though the former figure is almost twice the latter, because of the small sample size the disparity carries relatively little information. (See *Wade v. Terhune, supra*, 202 F.3d at p. 1198 [significance "limited" where corresponding ratios were "four of sixty-four (or 6%)" (proportion of group in pool) and "one of three (or 33%)" (proportion of challenges exercised against group)].)

[5] Renewing the *Wheeler-Batson* arguments in the motion for new trial, defense counsel asserted the prosecutor's questioning of the excused African-American women was perfunctory. The trial court observed in response that the prosecutor *had* asked the women questions, "but, more importantly, we had an extensive questionnaire with regard to every juror. So even if perfunctory questioning was done as to any juror, when you have a questionnaire, it can never be a perfunctory examination." Defendant does not contend the questioning was especially desultory in light of the questionnaires.

African-American woman.[6] Moreover, the prosecutor did not exercise peremptory challenges against most or all members of *defendant's* parallel group, African-American men; three of them served on the jury. These facts, we believe, simply do not " 'give[] rise to an inference of discriminatory purpose.' " (*Johnson v. California, supra*, 545 U.S. at p. 168.)

For much the same reasons, we disagree the defense made a prima facie case that Charles B. and Saldy P. were excused because they are of Filipino origin or ancestry. Assuming, as did the trial court, that both men are Filipino-Americans and that Filipino-Americans are, for purposes of *Wheeler* and *Batson*, a cognizable group distinct from other Asian-Americans, the record nonetheless fails to show how many other Filipino-Americans were in the venire and were not challenged by the prosecutor. The prosecutor did not use an extraordinary number of his peremptory challenges against members of this ethnic group, nor does defendant claim the prosecutor's voir dire of these prospective jurors was unusually desultory or that in respects other than their ethnic background or national origin the two were especially heterogeneous. Neither defendant nor any of the victims or percipient witnesses to the crimes were Filipino-Americans. Under these circumstances, the prosecutor's excusal of two Filipino-Americans does not create an inference of discrimination.

The defense showing was even weaker with regard to Prospective Jurors Francene B. and Lynne W., as nothing in the record showed they were members of the group against whom defense counsel claimed the prosecutor was discriminating.

[6] Defendant notes that Mitchell, Joey's mother, was not "in a legal sense" a victim of the charged homicide and robbery. That is irrelevant for the present purpose, however, as the loss of her son at defendant's hands obviously made her a victim of defendant's crimes as the jury would see it.

lesbians. (Like the trial court, we assume lesbians are a cognizable group for *Wheeler-Batson* purposes.) In the context of racial discrimination, we have stated that a *Wheeler* motion may sometimes be based on "appearances," without the need to "establish the true racial identity of the challenged jurors" (*People v. Motton, supra*, 39 Cal.3d at p. 604), but sexual orientation is usually not so easily discerned from appearance. Without any definite indication that the challenged prospective jurors either were lesbians or that the prosecutor believed them to be such, no prima facie case of discrimination against lesbians as a group can be made. (See *In re Freeman* (2006) 38 Cal.4th 630, 644–645 [*Wheeler-Batson* claim failed for insufficient showing that challenged prospective jurors either were Jewish or were thought to be so by the prosecutor].) Even assuming Francene B. and Lynne W. are lesbians or were thought to be such by the prosecutor, the record does not establish how many other lesbians went unchallenged by the prosecutor. Nor do any other of the circumstances mentioned in *Wheeler* apply: The prosecutor did not use an extraordinary number of his peremptory challenges against lesbians; defendant does not claim the prosecutor's voir dire of these prospective jurors was unusually desultory or that in respects other than their sexual orientation the two were especially heterogeneous, and neither defendant nor any of the victims or percipient witnesses to the crimes were identified as lesbians at trial. No inference of discrimination has been raised.

We emphasize that we have discussed the various factual circumstances mentioned in *Wheeler* and other cases not as affirmatively showing the absence of discrimination but only as indications of why defendant did not meet his burden of raising an inference of discrimination. For example, that defendant was not a member of any of the actual or assumed cognizable groups involved (African-American women, Filipino-Americans, lesbians) neither proves the peremptory

challenges against members of these groups were not discriminatory nor defeats defendant's motion as a matter of law; it merely identifies a factor that, because it is absent, fails in this case to support an inference of discrimination. It was defendant's burden to make a prima facie case. His attempt to do so fell short because he presented no factual circumstances other than the numbers of peremptory challenges used against each group—which in this case were too small to raise, by themselves, any inference of discrimination—and a record of voir dire that appellate counsel himself characterized as "unremarkable."

This court, like the trial court, has been able to determine that defendant made no prima facie case without hypothesizing permissible reasons that might have motivated the prosecutor's challenges. (Cf., e.g., *People v. Avila, supra*, 38 Cal.4th at pp. 553–556.) Consequently, we have found a comparison of the challenged prospective jurors and seated jurors neither necessary nor appropriate. Defendant acknowledges this court's past reluctance to perform such a comparative juror analysis for the first time on appeal (see *People v. Cornwell, supra*, 37 Cal.4th at p. 71), but argues our practice should be reevaluated in light of *Miller-El v. Dretke* (2005) 545 U.S. 231.

In the circumstances of this first-stage *Wheeler-Batson* case, comparative juror analysis would make little sense. In determining whether defendant has made a prima facie case, the trial court did not ask the prosecutor to give reasons for his challenges, the prosecutor did not volunteer any, and the court did not hypothesize any. Nor, obviously, did the trial court compare the challenged and accepted jurors to determine the plausibility of any asserted or hypothesized reasons. Where, as here, no reasons for the prosecutor's challenges were accepted or posited by either the trial court or this court, there is no fit

subject for comparison. Comparative juror analysis would be formless and unbounded.

Miller-El v. Dretke, supra, 545 U.S. at pages 241–252, does not mandate comparative juror analysis in these circumstances. As we have previously explained, *Miller-El* arose at the third stage of a *Wheeler-Batson* inquiry, "after the trial court has found a prima facie showing of group bias, the burden has shifted to the prosecution, and the prosecutor has stated his or her reasons for the challenges in question." (*People v. Gray* (2005) 37 Cal.4th 168, 189.) The high court did not consider whether appellate comparative juror analysis is required "when the objector has failed to make a prima facie showing of discrimination." (*Ibid.*) A fortiori, *Miller-El* does not mandate comparative juror analysis in a first-stage *Wheeler-Batson* case when neither the trial court nor the reviewing courts have been presented with the prosecutor's reasons or have hypothesized any possible reasons.

Defendant argues comparative juror analysis is appropriate here because defense counsel relied on such comparisons at trial. We disagree. Trial counsel asserted that the questionnaires of the two challenged African-American women were "nondescript" and contained nothing "controversial," and that one of the women was "about as neutral as any prospective juror." But counsel did not point to any specific questionnaire or voir dire of jurors the prosecution had accepted and thus did not make any actual comparisons between seated jurors and those the prosecutor had excluded. Moreover, as neither the prosecutor nor the trial court mentioned as reasons for their excusal the two women's questionnaire responses, voir dire or any other characteristic, there was nothing trial counsel could have focused on for such a comparison. Counsel's comments, in these circumstances, were too vague and general to impose on the trial court—or

this court—a duty to compare these prospective jurors, as to unspecified criteria, to unnamed jurors accepted by the prosecutor.

II. Judicial Misconduct: Disparaging Remarks About Defense Counsel

Defendant contends the trial court "overstepped the bounds of impartiality" by disparaging defense counsel in front of the jury, thereby depriving defendant of his federal and state constitutional rights to a fair trial by an impartial judge, due process, and a reliable determination of penalty. We disagree; in the context of the entire trial, the remarks complained of could not reasonably have been understood as reflecting bias against the defense.

Defendant's contention rests on four remarks by the trial court in the course of the two-month-long jury trial:

1. During the prosecution guilt phase case-in-chief, the court called a slightly early end to a day's testimony because no other witnesses were available. Court and counsel then discussed the next day's start time before excusing the jury:

"The Court: Okay. Well, we should not punish the attorneys for being efficient, so we'll just all stop for the day. It's only 15 minutes earlier than we would stop normally.

"Counsel, I think that we can just start at nine o'clock tomorrow. We have nothing we need to discuss before we proceed tomorrow?

"Mr. Sickels [the prosecutor]: Don't believe so.

"Mrs. Leonard [defense counsel]: Possibly.

"The Court: That means Ms. Leonard is going to go back to her office tonight and dream something up.

"Mrs. Leonard: Oh, that's not quite what I mean, your honor. There may be something—

"Mr. Liss [defense counsel]: Our objections are based on facts, not dreams.

"The Court: My question is, do you think we should bring the jury in at 9:15?

"Mrs. Leonard: I think that's a good idea, your honor, 9:15.

"The Court: Do you think we'll be more than 15 minutes?

"Mrs. Leonard: I hope not."

2. During the prosecutor's cross-examination of a defense guilt phase expert, defense counsel objected to the form of a question:

"Mr. Liss: Your honor, I am going to object at this point as being not only hearsay, but improper questioning, and that it appears at this point just [to] be wholesale reading of a report, and I would like to be heard at side-bar.

"The Court: Do you want to be heard at side-bar?

"Mr. Liss: Yes, your honor.

"The Court: Well, I think the objection will be overruled. I mean, we heard this objection just the other way

yesterday and I ruled in your favor. This is all admissible, and you argued it was admissible yesterday and I agreed with you.

"Mr. Liss: Perhaps I am looking for questions, but I will leave it at that.

"The Court: Overruled."

3. During the same cross-examination, the prosecutor moved to strike a response as nonresponsive. The following discussion ensued:

"The Court: What was your—why don't you restate your question?

"Mr. Liss: Your honor, I'd ask that his question be reread. And this is responsive to it.

"The Court: I don't think you make friends with the court reporter when you do that. It's very hard for her to dig that out.

"Do you remember your question, or do I need to—if you don't, I'll have it reread."

4. At the end of penalty phase instructions, court and counsel discussed a number of issues during a recess. When the jury was brought back in, the court apologized for the delay, saying: "The attorneys managed to find a half dozen things to fight about during the recess."

"A trial court commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution." (*People v. Carpenter*

(1997) 15 Cal.4th 312, 353.) The court's comments here did not create that impression.[7]

Regarding the court's first challenged comment, whether it was intended humorously (as the Attorney General argues) or would have been so understood by the jury is not entirely clear from the transcript. The trial record reflects a generally cordial relationship between the court and all counsel and includes a number of occasions on which the court and counsel made jokes or kidded one another. Defendant observes that such joking was mainly reserved for proceedings outside the jury's presence, as is of course appropriate, but we note the court later made an ironic comment very similar to the first remark complained of, but referring to *the attorneys generally*, in the jury's presence:

"The Court: ... Mr. [K.], did you have a question?

"Juror [K.]: Your honor said nine o'clock?

"The Court: Are you saying that with a bit of skepticism because we never really start at nine?

"Juror [K.]: Wasn't sure. I am sorry, your honor.

"The Court: I suggest nine o'clock. It wouldn't surprise me, but what *the attorneys will think up something to talk*

[7] The Attorney General argues the claim is forfeited by defendant's failure to object. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1108.) As to the third and fourth remarks complained of, we agree. Defense counsel, however, expressly objected to the court's second remark out of the jury's presence, and, by his statement before the jury that "[o]ur objections are based on facts, not dreams" after the court's first challenged remark, counsel effectively indicated his objection to any judicial implication that he or cocounsel would "dream up" issues to discuss.

about between now and Monday, maybe I can get them to come in here Friday and talk about it if that's necessary. Hopefully we'll start just soon after nine o'clock." (Italics added.)

This suggests the earlier remark, too, was meant, and would reasonably have been taken, not as a serious attack on defense counsel's integrity but simply as an ironic way of conveying to the jury the court's uncertainty about the trial schedule. Both remarks suggest an attempt to cajole the jurors into patience with the proceedings partly by sardonically casting responsibility for delays on the attorneys. By the same token, the court made clear to the jurors that it was not seriously criticizing the lawyers; indeed, immediately before making the just quoted remark, the court expressly praised the attorneys' efficiency:

"The Court: ... We should actually be quite grateful that the attorneys, all of them, have gotten right to the point and haven't wasted a lot of time in their questioning. I've certainly seen the opposite of that during my years as a judge, so I suspect that we are better off with attorneys like these attorneys who get right to the point."

In this context, we consider it unlikely that the first remark complained of was either intended or understood as a serious attack on the integrity of Defense Counsel Leonard.

The second remark complained of, unlike the first, was clearly meant seriously, and it could, as defendant argues, have been understood by jurors as a suggestion that defense counsel were "arguing out of both sides of their mouths," an implied criticism that would better be made out of the jurors' presence. In the setting of a protracted trial, however, the court's momentary and isolated expression of irritation with defense

counsel did not indicate bias or suggest to the jury that the court was "allying itself with the prosecution." (*People v. Carpenter, supra*, 15 Cal.4th at p. 353.) The trial court also occasionally expressed annoyance at the prosecutor, including one occasion on which the prosecutor's request to approach the bench led to an extended sidebar discussion, after which the court called a recess and told the jury the court was "really not happy with these things coming up at the spur of the moment while the jury is sitting here that the court has not been advised of in advance."

The third remark complained of was not critical of defense counsel; the court merely stated its reason for preferring that the question be re-asked rather than read from the reporter's notes. The fourth comment, that "[t]he attorneys managed to find a half dozen things to fight about during the recess," did not expressly or impliedly criticize the defense. Even if meant or understood seriously, the comment was aimed at "the attorneys" generally. Neither of these remarks suggests bias or gives the impression of a judicial alignment with the prosecution.

We conclude the court's comments did not infringe on defendant's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article 1, sections 15 to 17 of the California Constitution.

III. Evidence of Lack of Remorse in Guilt Phase Trial

During the prosecution case-in-chief, each of the two detectives who first interviewed defendant about the crimes testified, over defense objections, that during the interview (in which defendant admitted stealing from Mitchell's house but not killing Joey) defendant expressed no remorse for the

crimes. Defendant contends this testimony was irrelevant and that its admission violated Evidence Code section 352 and his state and federal constitutional rights to a fair trial.[8] We disagree.

The central factual issue litigated in the guilt phase trial was whether, as the prosecutor alleged, defendant killed the victim to facilitate his thefts or, as the defense maintained, the thefts and killing were separate in their origins and purposes, the killing having occurred during a psychotic break in which defendant was motivated by displaced, long-repressed rage over his own treatment as a child. Defendant's apparent lack of remorse on the day after the crimes was relevant to this question because, if the defense version of events were true, one might reasonably expect defendant, upon recovering from the psychotic episode and realizing the senseless violence he had done, to feel tremendous remorse for his unprovoked killing of a child with whom he had felt empathy. As the trial prosecutor put it in response to the relevance objection, "if there was something evil within him to cause him to do this, he would be expressing remorse from day one, and there is no such expression."

Defendant notes that when the prosecution introduced the challenged testimony, the defense had not yet put forward the expert testimony supporting the defense theory. Relying on our statement that "unless a defendant opens the door to the matter in his or her own case-in-chief [citation], his or her

[8] The defense objections to the testimony of the first detective encompassed the grounds for exclusion raised on appeal. To the second detective's testimony, the defense objected only on the ground of the best evidence rule, a ground for exclusion that is not renewed on appeal. The appellate claim has thus been preserved as to the first but not the second detective. (Evid. Code, § 353.)

remorse is irrelevant at the guilt phase" (*People v. Jones* (1998) 17 Cal.4th 279, 307), defendant argues he had not yet opened a door to proof of his lack of remorse. But defendant *had* already introduced the issue of his motivation for killing Joey. In her opening statement (made before the prosecution case-in-chief), defense counsel had already outlined the defense theory that defendant, on encountering Joey, felt "strange thoughts inside him ... something pushing him to stab Joey," "something in him so evil he couldn't overcome it," which a psychologist would explain was "pent up rage, based on things that happened to him in his past," that made him kill the victim, and that afterward he could not remember the details of what he had done and wanted to get caught. Because remorse would more clearly be expected under this defense theory than under the prosecution theory of coldblooded robbery murder, by positing the defense theory even before the prosecution evidence had been presented "defendant himself placed the issue of his remorse into question." (*People v. Clark* (1993) 5 Cal.4th 950, 1016.) The testimony was not irrelevant.

Nor did the trial court abuse its discretion in declining to exclude the evidence under Evidence Code section 352 as more prejudicial than probative. Immediately surrounding the questions regarding remorse and regret, the prosecutor asked the detectives whether defendant ever indicated "that he didn't know what he had been doing" during the incident and whether defendant was able to supply details of his activities on the day of the crimes. Thus, the context of the prosecutor's questioning made clear the evidence was being introduced not, as defendant asserts, to "punish [defendant] for his failure to express regret or remorse," but rather to rebut the defense theory—already outlined in defense counsel's opening statement—that defendant killed Joey during an irrational, rage-filled break from reality. As the evidence was probative on the central factual issue of the case, and as its introduction was clearly

targeted to that issue rather than to creation of prejudicial emotion, we cannot agree with defendant that the court's choice to admit it was arbitrary or capricious. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) For the same reason, we reject the associated contention that introduction of the evidence violated defendant's constitutional rights to a fair trial by jury under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution.

Finally, any state-law error in admitting the detectives' testimony was harmless. Evidence was later introduced showing that during defendant's second police interview, in which he admitted for the first time that he had killed Joey, defendant cried and told the interviewer that after "the drugs wore off" he had become upset at the realization of what he had done, and also showing that he expressed guilt and remorse when interviewed in jail by the defense psychologist. That the jury reached its verdicts by deciding to punish defendant for his lack of remorse, while ignoring the evidence defendant actually did express remorse, is not reasonably probable. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

IV. Restriction on Expert Testimony

Under Evidence Code section 352, the trial court excluded certain proposed testimony by Richard Levak, the defense psychologist, recounting defendant's statements regarding his killing of Joey. Defendant contends the ruling was error under the Evidence Code provision and deprived him of constitutionally due process. We disagree; the ruling did not constitute an abuse of the court's discretion and, in any event, did not affect the fairness of the trial.

During his interview with Levak, defendant had described his childhood abuse and his actions and thoughts during the crimes; defendant's statements on these matters were reflected in Levak's written report. Before Levak testified, the prosecutor objected to the psychologist "reciting specific statements made by the defendant to him ... under the guise" of explaining the basis for his expert opinion. The defense argued such statements were admissible, with a limiting instruction if necessary, under Evidence Code section 802 to show the basis for Levak's opinion.

The trial court ruled Levak could not testify "to what Mr. Bell told him about the events on June 4th," but could testify to defendant's statements regarding his "psychological background," including childhood abuse. In so ruling, the court expressly applied Evidence Code section 352, finding that a limiting instruction would be insufficient to prevent the jury from considering defendant's statements about the crimes themselves, as related by Levak, as evidence of the truth of the events, effectively permitting defendant to testify to his version of events without being subject to cross-examination. The potential for such prejudice was less as to defendant's psychological history, the court found, because that issue was less central to the case. Immediately before Levak testified, the court admonished the jury not to consider any statements of defendant related by Levak for their truth, but only as showing the basis for the expert's opinion.

The law governing this issue is well settled. "Expert testimony may ... be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. (Evid. Code, § 801, subd. (b); [citations].) ... [¶] ... And because Evidence Code section 802 allows an expert witness to 'state on direct examination the

reasons for his opinion and the matter ... upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. [Citations.] [¶] A trial court, however, 'has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay.' [Citation.] A trial court also has discretion 'to weigh the probative value of inadmissible evidence relied upon by an expert witness ... against the risk that the jury might improperly consider it as independent proof of the facts recited therein.' (*People v. Coleman* (1985) 38 Cal.3d 69, 91.)" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618–619.)

"Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth. ([*People v.*] *Coleman, supra*, 38 Cal.3d at p. 92.) [¶] Sometimes a limiting instruction may not be enough. In such cases, Evidence Code section 352 authorizes the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. (*Coleman, supra*, 38 Cal.3d at pp. 91–93.)" (*People v. Montiel* (1993) 5 Cal.4th 877, 919.)

Defendant argues the trial court overestimated the prejudice that would result from allowing Levak to fully relate defendant's statements about the crimes. With regard to the efficacy of a limiting instruction, defendant contrasts this case with those involving inflammatory material that would inevitably prejudice the jury. (See, e.g., *People v. Coleman, supra*, 38 Cal.3d at p. 93 ["[a]ccusatory statements 'from the grave' "].) Nor, defendant argues, was the prosecution's inability to cross-examine him about his statements particularly prejudicial: The jury could assess defendant's credibility from

his demeanor and responses in his videotaped confession to police. The Attorney General responds that defendant is merely asking the court to substitute "his own Evidence Code section 352 balancing process" for the trial court's.

While the potential for prejudice may not have been as great as suggested by the trial court, we agree with the Attorney General that the court's weighing of prejudice and probativeness was not arbitrary or capricious. (*People v. Rodrigues, supra*, 8 Cal.4th at pp. 1124–1125.) Though the excluded statements were not particularly inflammatory, for the jury to separate their proper and improper uses would have been difficult. And the chance to observe defendant's demeanor in a videotaped police interview the day after the crimes does not substitute for cross-examination regarding statements he made months later to a defense psychologist.

In any event, any error in the court's ruling was harmless. Ample evidence of defendant's statements about the crimes, forming a basis for Levak's opinion (and for the very similar opinion of Dr. Smith), was presented by both parties. In the videotaped confession, introduced in the prosecution case, defendant said he did not know why he had killed Joey, that he felt something evil "pushing" him and he "just flipped." Despite the court's ruling, on direct examination Levak testified without objection that "Mr. Bell described it [stabbing Joey] as feeling outside of himself, observing himself, almost observing in a trance like state." Smith, who had reviewed Levak's report as well as the videotaped confession, testified on direct examination that according to the materials he had reviewed, Joey and defendant had no negative interaction, Joey did not try to stop defendant from taking the television or boom box. In Smith's own interview with defendant, defendant "talked about evil forces coming into his head" and "described himself in this, when the actual killing was occurring, as watching

himself doing it." Defendant said he "just repressed it until the next day during the confession." On cross-examination, Smith repeated that defendant "described to me" a sudden loss of contact with reality. Defendant told Smith he was not angry at Joey, who posed no threat to him. Defendant also told Smith that after the stabbing it was "almost like he didn't do it" and he "described" to Smith how during the videotaped interview "it came flooding back to him."

The court's ruling notwithstanding, then, the jury heard a great deal of evidence of defendant's statements about the crime to the police and the psychological experts. The statements to Levak excluded by the ruling would have been largely cumulative of this evidence.[9] The jury was fully informed of statements by defendant forming the basis for the experts' opinions that defendant killed Joey in a dissociative state, a brief break with reality, and not in order to facilitate his taking the television. There is no reasonable likelihood that admission of additional testimony by Levak on this point would have changed the jury's verdicts. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)[10]

[9] The excluded statements were, in summary, that defendant and Joey were pleased to see one another; that while Joey was watching television defendant momentarily forgot why he had returned to the house; that when the idea of killing Joey came to him he resisted it, but it came back and "[f]rom then on I had no control"; that the stabbing felt to him "like a side event" to the thefts; and that later he did not consciously remember stabbing Joey, though he knew he had stolen the television and boom box. At the time of the court's ruling, defense counsel acknowledged that "most of it already frankly has been discussed one way or another."

[10] Nor, in light of the substantial amount of evidence admitted on this point and the largely cumulative character of that excluded, can we agree the challenged ruling deprived defendant of his rights to a fair trial, a meaningful opportunity to present a defense, or a reliable determination of the death penalty under the Sixth, Eighth and Fourteenth Amendments to the

Defendant also complains of the court's later ruling striking a question and answer during the prosecutor's cross-examination of Levak. As the prosecutor questioned Levak regarding his opinion of the psychological process leading to Joey's killing, the following exchange occurred:

"Q: So when he walked in the house and saw Joey watching television, and he was bent on stealing so he could buy more cocaine, all of a sudden he reverted back to when he was a child and remembered all the times he was in trouble in school?

"A: You make it sound trite.

"Q: No, I'm just trying to clarify what you just told us.

"A. Right. Oh, good. What I think happened is that he came home, and Joey was home watching TV. And he, in his statement, forgot the purpose of his visit momentarily.

"Mr. Sickels [the prosecutor]: Objection. Move to strike, your honor."

The prosecutor's "objection" was overruled,[11] and the witness continued his answer:

"A: Let me just calm myself. [¶] When he came home his statement was that he walked in the door, saw Joey home, was surprised that Joey was home, and started to talk to him

United States Constitution and article I, sections 15 and 17 of the California Constitution.

[11] What the prosecutor objected to was not clear — presumably it was not to his own question. A nonresponsive answer is properly the subject of a motion to strike (Evid. Code, § 766), not an objection.

and momentarily forgot why he was there and sat and talked to him. And then I think Joey went into the kitchen, from his statement.

"Mr. Sickels: Your honor, I'm going to object and move to strike this as beyond anything that I have inquired of this witness. He's purely volunteering information."

Rather than have the question reread by the reporter, as the defense suggested, the court sustained the prosecutor's "objection"[12] and told him to re-ask the question. The prosecutor then repeated his request to have the witness's answer stricken, to which the defense objected.

A lengthy discussion in chambers ensued. Defense counsel, citing Evidence Code section 356, argued that the prosecutor, by asking Levak to clarify his theory of how defendant's state of mind had changed when he encountered Joey, had opened the door for Levak to relate defendant's version of events; the prosecutor insisted the witness's answer was not responsive to his question. The court agreed with defense counsel that the prosecutor had opened a door to Levak's relation of defendant's statements, but observed that "this is a complete mess because of all the objections. And I'm going to just strike it all." Over a defense objection, the court told the jury it was striking "both the last question by the district attorney, as well as the last answer by the witness." The prosecutor continued his cross-examination on a different topic.

We agree with the trial court and the defense that the prosecutor, by asking Levak to "clarify" how defendant could have "all of a sudden" lost his focus on stealing the television when he unexpectedly encountered Joey, opened the door for

12 See footnote 11, *ante*.

Levak to explain further the basis for his opinion about defendant's mental processes during that encounter, including the relation of statements defendant made to him on that subject. Levak's answer was thus responsive to the prosecutor's question.

Moreover, we agree with defendant that it was error to strike the question and answer. Having asked the proverbial "one question too many" and received an answer he did not like, the prosecutor was not entitled to turn back the clock. Although the record of objections and motions may have been in a "confused state," as the trial court said, the prosecutor's question and Levak's answer were clear enough. The *evidence* was not in a particularly confused state, and there was no apparent reason to strike it.

Nevertheless reversal is not required. As discussed above, the jury was fully informed, through the videotaped confession and the testimony of Levak and Smith, of defendant's version of his encounter with Joey, which formed one of the bases for the experts' opinion that defendant killed Joey in a dissociative state connected to a transient psychotic break with reality. In particular, they knew defendant had said he did not know why he had killed Joey rather than just take the television, that he felt pushed to do so by an evil feeling, and that he experienced the killing as if watching himself do it. The jury was not reasonably likely to reach a different verdict had it also considered, as a basis for the expert opinions, defendant's statement that, on encountering Joey, he "momentarily forgot why he was there and sat and talked to him" for some period before stabbing and kicking him to death and stealing the television and boom box.

V. Court's Treatment of Holdout Juror

Defendant contends the court erred in its response to a jury note regarding an 11-to-1 impasse in guilt phase deliberations and erred again by inadequately investigating the holdout juror's later claims of intimidation. These errors, defendant claims, led to the juror's discharge and the return of guilt verdicts by the reconstituted jury. We disagree; the trial court did not abuse its discretion in either respect.

The claim's factual background is as follows:

The jury began its guilt phase deliberations at 2:20 p.m. on Tuesday, November 16, 1993, and was excused for the day at 4:00 p.m. The next day, Wednesday, November 17, deliberations began at 9:00 a.m. At 9:40 a.m. the jury sent out a note (jury note No. 19) asking for clarification of the phrase "accomplished by" in the court's instruction that one element of the robbery charge was that the taking of property "was accomplished either by force, violence, fear or intimidation." With the agreement of counsel, the court told the jury it could not further define the instructional phrase. At 10:39 a.m. the jury withdrew to resume deliberations, which continued until 4:00 p.m.

On Thursday, November 18, the jury again resumed deliberations at 9:00 a.m. At 1:45 p.m. the jury sent out a note (jury note No. 20) indicating an impasse in the deliberations. The note, which was signed by the foreman, Juror Mark D., read: "We have not been able to arrive at a verdict. Specifically, we have one jury member who can not find 'the taking was accomplished either by force, violence, fear or intimidation.' "

Out of the jury's presence, the court proposed to have the jury resume deliberations with the following admonition, which the court observed was based on one approved in *People*

v. Rich (1988) 45 Cal.3d 1036, 1116–1117: "This has been a long trial. The evidence was extensive. The legal issues are complex. Reasonable people could disagree. However, at the time I received your note the jury had been deliberating less than three days. In my opinion you may not have been deliberating long enough to discuss this case fully and to understand fully each other's viewpoint. Please continue your deliberations."

Defense counsel objected, urging the court instead to inquire of the jurors whether they believed themselves hopelessly deadlocked and, if they did, to declare a mistrial. Otherwise, counsel suggested, the court risked setting the stage for the jury majority to coerce the holdout juror into a verdict. If the court was not willing to inquire of the jurors, counsel concluded, the defense asked for a mistrial. The prosecutor pointed out the jury had been deliberating less than *two* days after a month and a half of trial, and urged the court not to consider a mistrial. The trial court overruled the defense objection, denied the mistrial motion, and admonished the jury as proposed, while correcting the reference to deliberation time from less than three days to less than two.

The jury returned to the jury room at 2:20 p.m. At 4:00 p.m. they were excused for the day. At the same time, the court received an additional note (jury note No. 21). This note, from Juror No. 11, Aron G., stated: "Sir, I am in psychological pain. I wish to be excused from this jury. I feel the level of intimidation from a couple of jurors toward me that make this process impossible. I am emotionally battered by this situation and can no longer tolerate the strain. I am very sorry but I can no longer function in this environment."

Discussing jury note No. 21 after the jury had left, the trial court agreed with defense counsel that the jury should not

be asked to deliberate further until the court decided how to respond. Because of the court's schedule of other matters, however, it was impossible to research and discuss the proper response until the afternoon of the next day. With agreement of counsel for both sides, the court decided to excuse the jury the next morning for the weekend, giving them a cooling-off period, and to meet with counsel later on Friday for discussion.

At 9:00 a.m. the next day (Friday, Nov. 19), over defense objections that it could increase the pressure on Juror Aron G., the court examined her briefly without the other jurors present, asking if her "position has changed from the note you left us last night." The juror answered, "No," and left the courtroom. Defense counsel then requested that the court admonish all the jurors to show each other "respect and courtesy," so they would have the weekend to "mull that over." Denying that request, the court excused the jurors until Monday morning, telling them that "a legal issue concerning deliberations has come up."

On the afternoon of Friday, November 19, the court and counsel discussed Aron G.'s allegation of "intimidation" by other jurors and her request to be excused from the jury. The defense again requested a mistrial, which was again denied. Alternatively, the defense requested that the court admonish the jurors to "listen to each other and use a reasoned approach," to "be civilized and reasonable and fair." While indicating it would consider that request, the court also stated that it wished counsel to be prepared with questions they would like asked of Aron G. and, if further inquiry proved necessary, of the other jurors, regarding the course of deliberations.

By the time court next convened, however, at 9:30 a.m. on Monday, November 22, 1993, the situation had changed again: The court had received a two-page typed letter (jury note

No. 22) from the holdout juror, Aron G. Apologizing for the trouble she had caused the court, the juror explained that she was "as close to an emotional breakdown as I have ever been in my life, which is very frightening and disorienting for me." She then revealed that on the previous Thursday night, "I broke down and discussed the case and deliberation process with my husband." She knew doing so violated the court's directions, but "in an extremely traumatic and emotional state" she felt she "had to confide in someone, or just go crazy."

In the letter, Aron G. then gave some "background" regarding the course of deliberations. The jury, she wrote, had quickly resolved all the elements of robbery except the fourth one listed in the instruction, whether the taking was accomplished by force or fear; the remaining deliberation time was taken on this one question. While most of the jurors were sensible and fair, "as time went by a couple became increasingly impatient and frustrated, which eventually precipitated the personal attack and conveniently overheard sarcastic and demeaning comments about my intelligence and decision making skills." She also overheard jurors talking about the "time waste, cost and inconvenience" of the continuing deliberations; these remarks, though not directed at her, made her feel more "isolation and duress."

When Aron G. "confronted the parties involved," she was told she had " 'misunderstood' " and that if remarks were made, they were " 'unintentional.' " Although she continued to believe the remarks were indeed "most pointedly intended," she also acknowledged that she could be, as her husband suggested, naive about "the ways of the civilian and judicial world"[13] and

[13] The juror's letter referred to her "16 year Naval career," during which she had never been reduced to an "uncontrollable emotionality" as she had by deliberations, and observed that the type of personal attacks she suffered were "not tolerated in the Navy."

that "intimidation," the term she had used in her prior note, might be "a harsh and excessively powerful word" to describe the other jurors' behavior.

The defense renewed its request for a mistrial. The court stated it would either have to declare a mistrial or substitute an alternate for Aron G.; her misconduct and emotional state made it impossible for the court to retain her as a juror. The court decided to examine Aron G. and the jury foreman, Mark D., in an attempt to discover whether any jurors besides Aron G. had committed misconduct.

Questioned by the court, Aron G. said that despite getting some prescription drugs that helped calm her down over the weekend, she still felt as described in her letter. She did not believe she would function well as a juror and "I just don't think I would be impartial at this phase any more." She clarified that she had discussed the facts of the case, as well as the deliberations, with her husband. With regard to the "intimidation"—a term she acknowledged some people might not find applicable—she explained that after a long period of building tension between her and the other jurors, the comment that "pushed me over the brink" was made by Juror S. While the jury was examining a photographic exhibit showing the victim's stab wounds, Juror S. said something like: "You think this is crazy. What's really crazy is anyone who can look at all this and not see that a robbery was committed. That's what's really crazy." In response, Aron G. yelled back that she would not tolerate personal attacks. At that point, "there was a lot of yelling and screaming until everybody kind of calmed down."

Jury Foreman Mark D., also questioned by the court, denied there had been any intimidation during deliberations. Although Mark D. admitted that he and Juror S. were both "very strong opinionated individuals," he denied S. had said

anything intimidating to Aron G.: "[I]n fact ... there was one instance that specifically gave rise to this whole situation that was totally misinterpreted by Ms. [G.]" The court refused a defense request to ask Mark D. about jurors' comments concerning waste of time and money.

At the completion of its inquiry, the court decided not to declare a mistrial but instead to excuse Aron G. and swear an alternate juror to replace her. "The court's not convinced that there was any misconduct by way of intimidation in the jury room. Gosh, if anything, it sounds like typical deliberations. And the problem is the only misconduct we're left with is Ms. G[.] discussing the case with her husband." Defense counsel objected that the court's inquiry had been insufficient: Given that Aron G. had referred to "a couple" of jurors intimidating her, and that Mark D. admitted that he and Juror S. were the most aggressive jurors, "the court cannot turn its back on the possibility that Mr. [D.] perhaps was intimidating her as well." Counsel urged the court to interview all the jurors about possible intimidation.

Denying the defense request for further investigation, the court excused Aron G., finding good cause (§ 1089) in her failure to follow the admonition not to discuss the case with others and in her statements that she could no longer be impartial and was emotionally unable to continue. The court then swore in an alternate juror and instructed the jury to begin deliberations anew. At 11:07 a.m. the jury resumed deliberations. By 2:02 p.m. the same day (Monday, Nov. 22, 1993) they had reached their guilt and special circumstance verdicts.

Defendant contends the trial court erred in several respects.

First, he asserts the court abused its discretion when, in response to jury note No. 20, the court denied a mistrial without inquiring of the jurors whether they were hopelessly deadlocked. As defendant acknowledges, the question whether to declare a hung jury or order further deliberations rests, as both statute and case law provide, in the trial court's sound discretion. (§ 1140 [jury may be discharged without reaching a verdict if, "at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree"]; *People v. Proctor* (1992) 4 Cal.4th 499, 539; *People v. Rodriguez* (1986) 42 Cal.3d 730, 775.) "Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency [citation], the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived ' "as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered." ' " (*Proctor*, at p. 539.)

We conclude the denial of a mistrial without further inquiry was not an abuse of discretion on the facts here. While the trial court has a duty to avoid coercing the jury to reach a verdict, we have held that inquiry as to the possibility of agreement is "not a prerequisite to denial of a motion for mistrial." (*People v. Rodriguez, supra*, 42 Cal.3d at p. 777.) Moreover, the jury in this case had deliberated less than two full days, around 10 hours; we have upheld courts' denials of mistrials even after fruitless deliberations for longer periods. (See *People v. Sandoval* (1992) 4 Cal.4th 155, 194–197 [jury had deliberated for more than 14 hours over five days]; *Rodriguez*, at pp. 774–775 [11th day of deliberations].)

Defendant asserts that the guilt phase trial in his case was not "long, the evidence voluminous, and the issues complex" as in *People v. Rodriguez, supra*, 42 Cal.3d at page 775. We disagree. While not extraordinarily long for a special circumstances murder trial, defendant's guilt phase trial featured extensive and complicated testimony by toxicological, pharmacological, and psychological experts called by both sides, who differed sharply with one another over both their technical conclusions and their overall assessments of defendant's mental state at the time of the crimes. The question of fact on which the jury was troubled—the relationship between defendant's theft of the television and boom box and his killing of Joey—was at the center of this complex expert debate. For the trial court to conclude that extended deliberations might be necessary was not unreasonable.

Defendant also argues the order for further deliberations was coercive because the trial court knew (from the foreman's unprompted revelation in jury note No. 20) that the jury was split 11 to one for conviction and that the split involved an issue (whether the taking of property was accomplished by force or fear) that had troubled the jury since early in its deliberations. But while we have recognized the increased "*potential* for coercion once the trial judge has learned that a unanimous judgment of conviction is being hampered by a single holdout juror" (*People v. Sheldon* (1989) 48 Cal.3d 935, 959, we have rejected the view that denial of a mistrial in that circumstance is "inherently coercive" (*ibid.*). Despite the 11-to-one split, the trial court could reasonably believe further deliberations would lead to a unanimous understanding of the case among the jurors. With hindsight, we know that the court's hopeful expectation was not to be fulfilled. But the trial court's failure to guess correctly how the further deliberations would go does not make its order an abuse of discretion.

Second, defendant contends the trial court, in its instruction ordering further deliberations so that the jurors could come "to understand fully each other's viewpoint," impliedly suggested the holdout juror should change her mind. The court, defendant argues, should instead or in addition have instructed the jury that "the jurors [have] an individual duty to deliberate and to reach their own conclusions, rather than merely acceding to the majority view." We disagree; the court's admonition was not of a character that would expressly or impliedly coerce a verdict. (Cf. *People v. Sheldon, supra*, 48 Cal.3d at pp. 959–960 [giving examples of coercive admonitions].) Nor, for reasons already explained, do we agree with defendant that the court erred in telling the jury: "This has been a long trial. The evidence was extensive. The legal issues are complex." While there were differences between this case and *People v. Rich, supra*, 45 Cal.3d at pages 1116–1117, in which we approved a similar explanation of the need for further deliberations, the trial court's explanation here was tailored to the case before it and did not constitute an abuse of discretion.

Third, defendant faults the trial court for an inadequate investigation of matters mentioned in Juror Aron G.'s letter. Specifically, defendant contends the court should have sought more detail from Aron G. as to the contents of her discussion with her husband about the case and the effect of the incident on her, and should have interviewed jurors besides Aron G. and Mark D. regarding intimidation during deliberations.

As to the contents of Aron G.'s conversation with her husband and her ability to continue deliberations, we disagree more inquiry was needed. Asked whether she and her husband had discussed "the facts of the case" or only "the deliberation process," Aron G. answered: "I gave him the background as to why the problems were occurring, so yes, I discussed the facts concerned [*sic*] the points I addressed in there about the

robbery and the problems, I mean, my sense of the problems within the room, yes, sir." With regard to her ability to continue, Aron G. volunteered that she was sorry for what she had done, but "I just don't think I would be impartial at this phase any more." No further questioning was necessary in order to conclude that Aron G. had intentionally violated the court's admonition against discussing the case with outsiders and could no longer serve as an impartial juror.

As to other jurors' views of whether intimidation had occurred, the trial court acted within its sound discretion in concluding that further questioning would be an unwarranted intrusion into the secrecy of jury deliberations. (See *People v. Burgener* (2003) 29 Cal.4th 833, 878–879; *People v. Cleveland* (2001) 25 Cal.4th 466, 475–476.) Though Aron G. initially (in jury note No. 21) referred to "intimidation" by "a couple of jurors," in her subsequent letter she volunteered that that description might have been "harsh and excessively powerful." Interviewed by the court, she repeated that her perception of intimidation might have been idiosyncratic and "naive." When pressed for actual instances, she gave only one, a comment by Juror S. to the effect that Aron G. was herself "crazy" for accepting the defense psychological theory. In response, she recounted, she had "yelled" that she would not tolerate personal attacks, which led to generally raised voices until eventually the jurors "kind of calmed down." The foreman, Mark D., agreed there was "one instance" with Juror S. that gave rise to Aron G.'s complaints, but insisted she had "misinterpreted" it and that apologies had been made. With this information, the trial court could reasonably conclude there had been no actual intimidation of Aron G. by S. or other jurors, but only the type of heated discussion common to jury deliberations, and that to interview all the jurors, as the defense urged, would be to risk

" ' "depriv[ing] the jury room of its inherent quality of free expression." [Citation.]' " (*Cleveland*, at p. 476.)[14]

The trial court reasonably found Aron G.'s emotional reaction to the deliberations led to her own misconduct and inability to continue deliberating. Unfortunate as these events may have been, they were not the result of judicial error. The court did not, as defendant contends, effectively coerce a verdict in violation of his rights to due process, a fair jury trial, and a reliable determination of penalty under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 15, 16 and 17 of the California Constitution.

VI. Unconstitutionality of California's Death Penalty Statute

Defendant presents no claims of error specific to his penalty trial, but contends generally that California's death penalty statute and procedures are unconstitutional for a number of reasons. Defendant again cites the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 15, 16 and 17 of the California Constitution. We have recently and repeatedly rejected these general claims and do so here as well without extensive discussion.

[14] Nor do we agree with defendant that the court was required to inquire of the jurors concerning remarks about cost and waste of time that Aron G. recounted overhearing outside of deliberations. While the expense and inconvenience of a trial is irrelevant to guilt or innocence and reference to it in a court's instruction is thus improper (*People v. Barraza* (1979) 23 Cal.3d 675, 685), we know of no authority suggesting that a report of jurors grumbling among themselves over the length of deliberations indicates misconduct requiring investigation.

The special circumstances listed in section 190.2, together with other aspects of California homicide law, adequately narrow the class of murderers eligible for the death penalty. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 43; *People v. Stitely* (2005) 35 Cal.4th 514, 573; *People v. Snow* (2003) 30 Cal.4th 43, 125–126.)

Section 190.3, factor (a), permitting the jury to consider the "circumstances of the crime" as a factor in aggravation or mitigation, is not so vague as to allow for unconstitutionally arbitrary application and is not otherwise constitutionally improper as a sentence selection factor. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975–976; *People v. Proctor, supra*, 4 Cal.4th at pp. 550–551.)

Our statute "is not invalid for failing to require (1) written findings or unanimity as to aggravating factors, (2) proof of all aggravating factors beyond a reasonable doubt, (3) findings that aggravation outweighs mitigation beyond a reasonable doubt, or (4) findings that death is the appropriate penalty beyond a reasonable doubt." (*People v. Snow, supra*, 30 Cal.4th at p. 126.) No instruction on burden of proof is required in a California penalty trial because the assessment of aggravating and mitigating circumstances required of penalty jurors is inherently " 'normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79; accord, *People v. Demetrulias, supra*, 39 Cal.4th at p. 43; *People v. Gray, supra*, 37 Cal.4th at p. 236.)

Apprendi v. New Jersey (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584, requiring that certain sentencing findings be made by a jury, are inapposite for reasons previously explained: " '[U]nder the California death penalty scheme, once the defendant has been convicted of first

degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death *is* no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without possibility of parole. (§ 190.2, subd. (a).) Hence, facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate do not come within the holding of *Apprendi*.' [(*People v. Anderson* (2001) 25 Cal.4th 543, 589–590, fn. 14.)] The high court's recent decision in *Ring v. Arizona*[, *supra*,] 536 U.S. 584 does not change this analysis. Under the Arizona capital sentencing scheme invalidated in *Ring*, a defendant convicted of first degree murder could be sentenced to death if, and only if, the trial court first found at least one of the enumerated aggravating factors true. (*Id.* at p. 603.) Under California's scheme, in contrast, each juror must believe the circumstances in aggravation substantially outweigh those in mitigation, but the jury as a whole need not find any one aggravating factor to exist. The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another. Nothing in *Apprendi* or *Ring* suggests the sentencer in such a system constitutionally must find any aggravating factor true beyond a reasonable doubt." (*People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32; accord, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.)

"[W]e also disagree with defendant that our statute is unconstitutional because it does not require jurors to agree unanimously on the existence of particular factors in aggravation. [Citations.] While all the jurors must agree death is the appropriate penalty, the guided discretion through which jurors reach their penalty decision must permit each juror individually to assess such potentially aggravating factors as the circumstances of the capital crime (§ 190.3, factor (a)),

prior felony convictions (*id.*, factor (c)), and other violent criminal activity (*id.*, factor (b)), and decide for him- or herself 'what weight that activity should be given in deciding the penalty.' [Citation.] The series of normative judgments involved in deciding whether a particular circumstance is indeed aggravating and, if so, what weight it should be given, cannot be fitted into a scheme of unanimous jury factfinding." (*People v. Demetrulias, supra*, 39 Cal.4th at p. 41.)

"Comparative intercase proportionality review by the trial or appellate courts is not constitutionally required." (*People v. Snow, supra*, 30 Cal.4th at p. 126; accord, e.g., *People v. Gray, supra*, 37 Cal.4th at p. 237; *People v. Stitely, supra*, 35 Cal.4th at p. 574.)

" 'International law does not compel the elimination of capital punishment in California.' (*People v. Snow, supra*, 30 Cal.4th at p. 127.) Defendant's argument that the use of capital punishment 'as *regular punishment* for substantial numbers of crimes' violates international norms of human decency and hence the Eighth Amendment to the United States Constitution fails, at the outset, because California does not employ capital punishment in such a manner. The death penalty is available only for the crime of first degree murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. (E.g., Cal. Const., art. VI, § 11; §§ 190.1–190.9, 1239, subd. (b).)" (*People v. Demetrulias, supra*, 39 Cal.4th at pp. 43–44.)

VII. Cumulative Prejudice from Errors

We have identified one error at trial, the court's decision to strike, at the prosecutor's request, a question and answer on

cross-examination of a defense expert. (See pt. IV., *ante*.) Having concluded that error was harmless, we reject defendant's contention that the cumulative prejudicial effect of the court's asserted errors requires us to reverse his conviction and death sentence.

DISPOSITION

The judgment of the trial court is affirmed.

WERDEGAR, J.

GEORGE, C. J.

KENNARD, J.

BAXTER, J.

CHIN, J.

MORENO, J.

CORRIGAN, J.

Filed 3/28/07

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

S038499

v.

San Diego County

STEVEN M. BELL, Super. Ct. No. CR133096

Defendant and Appellant.

Opinion

The petition for rehearing is denied.

Cal Pen Code § 190

(a) Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Except as provided in subdivision (b), (c), or (d), every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life.

(b) Except as provided in subdivision (c), every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 25 years to life if the victim was a peace officer, as defined in subdivision (a) of Section 830.1, subdivision (a), (b), or (c) of Section 830.2, subdivision (a) of Section 830.33, or Section 830.5, who was killed while engaged in the performance of his or her duties, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties.

(c) Every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of life without the possibility of parole if the victim was a peace officer, as defined in subdivision (a) of Section 830.1, subdivision (a), (b), or (c) of Section 830.2, subdivision (a) of Section 830.33, or Section 830.5, who was killed while engaged in the performance of his or her duties, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties, and any of the following facts has been charged and found true:

(1) The defendant specifically intended to kill the peace officer.

(2) The defendant specifically intended to inflict great bodily injury, as defined in Section 12022.7, on a peace officer.

(3) The defendant personally used a dangerous or deadly weapon in the commission of the offense, in violation of subdivision (b) of Section 12022.

(4) The defendant personally used a firearm in the commission of the offense, in violation of Section 12022.5.

(d) Every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 20 years to life if the killing was perpetrated by means of shooting a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict great bodily injury.

(e) Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not apply to reduce any minimum term of a sentence imposed pursuant to this section. A person sentenced pursuant to this section shall not be released on parole prior to serving the minimum term of confinement prescribed by this section.

Cal Pen Code § 190.1

A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The question of the defendant's guilt shall be first determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2 except for a special circumstance charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 where it is

alleged that the defendant had been convicted in a prior proceeding of the offense of murder in the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Section 190.3 and 190.4.

Cal Pen Code § 190.2

(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was convicted previously of murder in the first or second degree. For the purpose of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree.

(3) The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden, or concealed in any place, area, dwelling, building, or structure, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect, an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or caused to be mailed or delivered, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.

(7) The victim was a peace officer, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties.

(8) The victim was a federal law enforcement officer or agent who, while engaged in the course of the performance of his or

her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a federal law enforcement officer or agent engaged in the performance of his or her duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his or her official duties.

(9) The victim was a firefighter, as defined in Section 245.1, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a firefighter engaged in the performance of his or her duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph, "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this or any other state, or of a federal prosecutor's office, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation

for, or to prevent the performance of, the victim's official duties.

(13) The victim was an elected or appointed official or former official of the federal government, or of any local or state government of this or any other state, and the killing was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity. As used in this section, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity" means a conscienceless or pitiless crime that is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim by means of lying in wait.

(16) The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin.

(17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies:

(A) Robbery in violation of Section 211 or 212.5.

(B) Kidnapping in violation of Section 207, 209, or 209.5.

(C) Rape in violation of Section 261.

(D) Sodomy in violation of Section 286.

(E) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of

Section 288.

(F) Oral copulation in violation of Section 288a.

(G) Burglary in the first or second degree in violation of Section 460.

(H) Arson in violation of subdivision (b) of Section 451.

(I) Train wrecking in violation of Section 219.

(J) Mayhem in violation of Section 203.

(K) Rape by instrument in violation of Section 289.

(L) Carjacking, as defined in Section 215.

(M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.

(18) The murder was intentional and involved the infliction of torture.

(19) The defendant intentionally killed the victim by the administration of poison.

(20) The victim was a juror in any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as defined in Section 415 of the Vehicle Code.

(22) The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang.

(b) Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer, as to whom the special circumstance has been found to be true under Section 190.4, need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in the state prison for life without the possibility of parole.

(c) Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4.

(d) Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which

results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4.

The penalty shall be determined as provided in this section and Sections 190.1, 190.3, 190.4, and 190.5.

Cal Pen Code § 190.3
If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve

the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or

violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant was reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the

aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in a state rison for a term of life without the possibility of parole.

Cal Pen Code § 190.4

(a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Whenever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of a separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach an unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by an unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and in the court's discretion shall either order a new jury impaneled to try the issues the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.

(b) I defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court

shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered an any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for

his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6).

(2)

No. 06-1714

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IN THE SUPREME COURT OF THE UNITED STATES

STEVEN M. BELL, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether, in determining whether Petitioner established a prima facie case of group bias under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the California Supreme Court was required to engage in comparative juror analysis for the first time on appeal, when the California Supreme Court, applying United States Supreme Court precedent, carefully considered all relevant factors bearing on its *Batson* inquiry, but found that on the particular record before it, any attempt at comparative juror analysis would have amounted to pure speculation.

2. Whether California's procedures for death penalty eligibility and selection comply with the requirement in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and its progeny, that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

LIST OF PARTIES

Petitioner Steven M. Bell is a California state prisoner incarcerated under a judgment of death at the California State Prison at San Quentin, California.

Respondent is the People of the State of California.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 06-1714

STEVEN M. BELL, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

OPINION OR JUDGMENT BELOW

The California Supreme Court opinion in *People v. Bell*, 40 Cal. 4th 582, 151 P.3d 292, 54 Cal. Rptr. 3d 453 (2007) ("*Bell*"). (Pet. App., at A1-A54.)

The California Supreme Court affirmed Petitioner's conviction and death sentence on February 15, 2007. *Bell*, at 586, 622. (Pet. App., at A-1, A-54.) Petitioner's petition for rehearing was denied on March 28, 2007. (Pet. App., at A55.)

STATEMENT OF JURISDICTION

Petitioner filed a Petition for Writ of Certiorari before this Court on June 26, 2007, which was docketed on June 27, 2007. Petitioner asserts jurisdiction under 28 U.S.C. § 1257 and rules 13.1 and 13.3 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner relies on the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These provisions are set forth in the Petition for Writ of Certiorari at pages 1-2. Sections 190, 190.1, 190.2, 190.3 and 190.4 of the California Penal Code are reproduced in Petitioner's Appendix. (Pet. App., at A56-A70.)

STATEMENT OF THE CASE

On March 7, 1994, Petitioner Steven M. Bell was sentenced to death, after a California jury found him guilty of one count of first degree murder, one count of first degree robbery, and found as true allegations of personal use of a deadly weapon, personal infliction of great bodily injury, and a robbery-murder special circumstance pursuant to California Penal Code section 190.2(a)(17)(A). The California Supreme Court affirmed the judgment on February 15, 2007, and denied a petition for rehearing on March 28, 2007. (Pet. App., at A1-A54, A55.)

STATEMENT OF FACTS

In 1992, Petitioner was living with his girlfriend and her eleven-year-old son, Joey Anderson, in San Diego. After obtaining a government relief check and spending it all on crack cocaine, Petitioner returned to his girlfriend's house planning to steal the television set and stereo, so he could sell them to buy more crack cocaine. When Joey unexpectedly came home from school early that day, Petitioner stabbed and stomped Joey to death as Joey was watching television in his mother's bedroom. Petitioner then took the television set and stereo, and sold them for drugs. Petitioner left Joey's body behind for his mother to find when she returned home from work. Petitioner was arrested the following morning, and later in the day, agreed to be interviewed and voluntarily confessed to killing Joey. *Bell*, 40 Cal. 4th at 586-87. (Pet. App., at A1-A3.)

REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD BE DENIED ON PETITIONER'S *BATSON* CLAIM BECAUSE THE CALIFORNIA SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S JURISPRUDENCE, THERE IS NO NEED FOR FURTHER GUIDANCE FROM THIS COURT, THERE IS NO CONFLICT IN THE LAW, AND THE CALIFORNIA SUPREME COURT'S RULING WAS BASED ON THE PARTICULAR FACTS OF THIS CASE

Petitioner asks this Court to grant certiorari to review the California Supreme Court's decision which found Petitioner had not demonstrated a prima facie case, under *Batson v. Kentucky*, 476 U.S. 79 ("*Batson*"), that the prosecutor impermissibly challenged six jurors because of group bias. Petitioner contends that guidance is needed from this Court as to whether "comparative juror analysis" (i.e., a comparison of seated jurors to those who were excused) is an appropriate consideration at the first stage of a *Batson* inquiry. Petitioner further contends that the California Supreme Court erred when it concluded Petitioner did not meet his initial burden under *Batson*. (Pet. at 4-11.)

Respondent disagrees. Certiorari should be denied because Petitioner has failed to raise an important federal question. Instead, Petitioner is attempting to use certiorari review to reargue the California Supreme Court's application of this Court's precedent to his particular case. Moreover, there is no need for additional clarification from this Court on the issue of comparative juror analysis, nor is there a conflict in need of resolution. Finally, this case is not an appropriate one for this Court to further evaluate the issue of comparative juror analysis, even if it is inclined to do so.

In *Batson*, this Court held that the Equal Protection and Due Process Clauses preclude a prosecutor from challenging prospective jurors because of race, or on the assumption that jurors of a particular race will be more sympathetic to the defense. *Batson*, 476 U.S. at 92-

93.[1] This Court set forth a three-part test for determining whether peremptory challenges were constitutionally impermissible: (1) the moving party must make a prima facie showing the jurors were excluded because of group bias; (2) once a prima facie case is made, the burden shifts to the opposing party to provide a group-neutral explanation for the challenges; and (3) the trial court determines whether the moving party has carried his burden of proving purposeful discrimination. *Id.* at 93-94.

In *Johnson v. California*, 545 U.S. 162, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005) ("*Johnson*"), this Court held that California's prima facie case standard, that the moving party show a "strong likelihood" of group bias, or that challenges were "more likely than not" based on group bias, was too high. Rather, the proper standard was whether "the totality of the relevant facts gives rise to an inference of group bias." *Johnson*, at 168 (quoting *Batson*, at 93-94).

In his appeal to the California Supreme Court, Petitioner alleged error in the trial court's denial of his *Batson* motion for failure to establish a prima facie case as to six prospective jurors: two African-American women, two men who he thought might be Filipino-Americans, and two women he perceived were lesbians. After briefing was complete, this Court issued its decision in *Johnson*. Thereafter, before oral argument, the California Supreme Court requested supplemental briefs from the parties concerning the effect of *Johnson* on Petitioner's *Batson* claim.

In its opinion, the California Supreme Court assumed for purposes of its analysis that the trial court here used an improper

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1. This Court subsequently applied *Batson*'s anti-discrimination rule to the use of peremptory challenges by criminal defendants, *Georgia v. McCollum*, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992), by private litigants in civil cases, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991), and by prosecutors where the defendant and the excluded juror(s) are of different races, *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); and has held that equal protection principles prohibit excusing jurors because of gender. *J. E. B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). Constitutionally impermissible peremptory challenges are referred to herein as challenges based on group bias.

standard, i.e., "strong likelihood," in finding no prima facie case. *Bell*, 40 Cal. 4th at 596. (Pet. App., at A16.) The California Supreme Court stated that it would thus independently review the record, apply the standard in *Johnson*, and resolve the legal question of whether the record supported an inference the prosecutor excused a juror for a constitutionally impermissible basis. *Bell*, 40 Cal. 4th at 597. (Pet. App., at A16.)

The California Supreme Court stated that courts should consider all information in the record in determining whether there was a prima facie case. By way of example, the California Supreme Court set forth several considerations which this Court, lower federal courts and California state courts have found are important in making this determination: (1) whether the prosecutor struck more or all members of the identified group from the venire; (2) whether the only characteristic shared by the challenged jurors was their membership in the group while in all other respects they were as heterogenous as the entire pool of prospective jurors; (3) whether the prosecutor's voir dire of the challenged jurors was particularly desultory or non-existent; and (4) whether the defendant was member of the group allegedly excluded from the jury while the victim was a member of the group to which a majority of the remaining seated jurors belong. *Bell*, 40 Cal. 4th at 597. (Pet. App., at A17.)

The California Supreme Court then thoroughly examined the record in Petitioner's case in light of these settled legal principles. The California Supreme Court found that the facts of Petitioner's case did not support an inference of discrimination under *Johnson* as to any of the six prospective jurors about which Petitioner complained. *Bell*, 40 Cal. 4th at 597-600. (Pet. App., at A18-A22.)

In his instant Petition for Certiorari, Petitioner repeats verbatim the arguments he made in the California Supreme Court. Petitioner advances his interpretation of the facts regarding the jurors under consideration, and asserts that the trial court was wrong to find lack of a prima facie case. Petitioner expresses his disagreement with the ruling to the contrary by the California Supreme Court. (Pet. 7-11.) Petitioner's dispute with the California Supreme Court's application of settled legal principles and with its factual findings does not justify certiorari review. United States Supreme Court Rules, rule 10.

Petitioner contends that a grant of certiorari is appropriate because the California Supreme Court failed to evaluate all relevant circumstances when it rejected his *Batson* claim. (Pet. at 4.)

Specifically, Petitioner claims the California Supreme Court "refused" to engage in comparative juror analysis and that the California Supreme Court's decision conflicts with the Ninth Circuit's decision in *Boyd v. Newland*, 455 F.3d 897 (9th Cir. 2006) ("*Boyd*"). Petitioner argues that *Miller-El v. Dretke*, 545 U.S. 231, 162 L. Ed. 2d 196, 125 S. Ct. 2317 (2005), which concerned comparative analysis at the *third* stage of a *Batson* inquiry, allows such evidence to be introduced at the first stage, and that the California Supreme Court erred in "refusing" to consider such evidence. (Pet. at 4-7.)

Petitioner mis-characterizes the California Supreme Court's holding. The California Supreme Court did not categorically foreclose the possibility of comparative juror analysis, as Petitioner asserts. (Pet. at 6.) The California Supreme Court merely stated that comparative analysis was not *required* at the first stage of the *Batson* inquiry, when no such analysis was ever done in the trial court. *Bell*, 40 Cal. 4th at 601. (Pet. App., at A22-A23.)

The holding of the California Supreme Court is not inconsistent with the Ninth Circuit's decision in *Boyd*. The issue in *Boyd* was whether a California Court of Appeal acted unreasonably when it upheld the trial court's denial of a defendant's *Batson* motion for lack of a prima facie case, without providing the indigent defendant with a transcript of the entire voir dire proceedings for purposes of appeal. *Boyd*, 455 F.3d at 900. The Ninth Circuit held that a transcript was necessary, and remanded the case to the California state courts with directions to give the transcript to the parties and reconsider the merits of the alleged *Batson* error. *Id.* at 908-09.

In its discussion of why the transcript was important, the Ninth Circuit noted that to review a ruling on a *Batson* motion, an appellate court had to examine the totality of the relevant facts. *Boyd*, 455 F.3d at 904-05. The Ninth Circuit stated that in appropriate cases, such analysis *may* include comparative juror analysis. *Id.* at 906. The Ninth Circuit was careful to point out its agreement with California state courts on the necessity, or lack thereof, of comparative juror analysis, explaining, "Like the various California courts to address the issue, we do not hold that comparative juror analysis *always* is compelled at the appellate level." *Id.* (emphasis in original) (citing *People v. Ward*, 36 Cal. 4th 186, 114 P.3d 717, 30 Cal. Rptr. 3d 464 (2005)). An analogous holding was reached in Petitioner's case, i.e., that comparative analysis was not *required*. *Bell*, 40 Cal. 4th at 601.

(Pet. App. at A22-A23.)

Moreover, like the Ninth Circuit in *Boyd*, the California Supreme Court noted that an evaluation of the trial court's finding of no prima facie case necessitated a review of all relevant information in the appellate record. *Bell*, 40 Cal. 4th at 597. (Pet. App., at A17.) The California Supreme Court simply found that here, comparative juror analysis was not a relevant consideration, because statements by Petitioner's counsel at the time of the *Batson* motion that the challenged jurors were "nondescript," "not controversial," or "as about as neutral as any juror" were too vague and general to engage in a comparative analysis between these jurors and those who were seated as to other unspecified criteria. *Bell*, 40 Cal. 4th at 601. (Pet. App., at A23-A24.) Because the California Supreme Court based its decision on the particular facts of Petitioner's case, i.e., lack of any comparative analysis at trial which would provide a means to engage in such analysis on appeal, this case would not provide a good vehicle for certiorari. For this reason, too, certiorari should be denied.

II.

CERTIORARI SHOULD BE DENIED ON PETITIONER'S *APPRENDI* CLAIM BECAUSE THE CALIFORNIA SUPREME COURT'S DECISION FINDING CALIFORNIA'S DEATH PENALTY ELIGIBILITY AND SELECTION PROCEDURES CONSTITUTIONAL DOES NOT INVOLVE AN IMPORTANT FEDERAL QUESTION AND IS CONSISTENT WITH THIS COURT'S ESTABLISHED JURISPRUDENCE

Petitioner asserts that certiorari is necessary because California law does not require penalty phase jurors to unanimously agree beyond a reasonable doubt: (1) on the facts that constitute aggravating factors; and (2) that the aggravating factors substantially outweigh the mitigating factors. Petitioner argues that by failing to impose these requirements, California violates *Apprendi v. New Jersey*, 530 U.S. 466 ("*Apprendi*"), and its progeny, namely *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) ("*Ring*"), *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) ("*Blakely*") and *Cunningham v. California*, 549 U.S. __, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007) ("*Cunningham*").

(Pet. 12-26.)

Certiorari should be denied. The California Supreme Court's decision upholding California's death penalty eligibility and selection procedures comports with *Apprendi*. Eligibility for the death penalty is determined in the guilt phase by a unanimous jury finding of guilt of first degree murder and the existence of a special circumstance by proof beyond a reasonable doubt. The subsequent penalty selection phase, involving traditional sentencing considerations and no burden of proof (with the exception of proof of other crimes evidence), does not increase the defendant's authorized punishment.

In *Apprendi*, this Court found unconstitutional a New Jersey statute allowing for imposition of a "hate crime" enhancement without a jury finding. This Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Apprendi*, 530 U.S. at 490.

Ring extended the *Apprendi* decision to capital cases. In *Ring*, this Court invalidated Arizona's capital sentencing scheme because death could be imposed only after the judge, sitting as the sentencer without a jury, found at least one specifically enumerated aggravating factor to be true. *Ring*, 536 U.S. at 592-93. In reaching its conclusion, this Court explained:

> [I]f a State makes an increase in a defendant's *authorized* punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt. [Citation.] A defendant may not be "expose[d] to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." [Citations.]

Ring, 536 U.S. at 602 (emphasis added) (quoting *Apprendi*, 502 U.S. at 482-83).

In *Blakely*, this Court held that a Washington state trial court violated the defendant's Sixth Amendment right to a jury trial when it sentenced him to a ninety-month "exceptional sentence," which was thirty-seven months beyond the crime's "standard range" of forty-nine to fifty-three months under Washington state law, based on a finding by the court that the defendant had acted with deliberate

cruelty in committing the crime. This Court reasoned that fifty-three months was the statutory maximum for *Apprendi* purposes. Because no jury found beyond a reasonable doubt the fact supporting the trial court's upward departure from the fifty-three-month statutory maximum, the defendant was denied his right to a jury trial. *Blakely*, 542 U.S. at 298-305.

In *Cunningham*, this Court held that California's procedure for selecting upper term sentences under its Determinate Sentencing Law ("DSL"), like the exceptional sentence provisions at issue in *Blakely*, violated the defendant's Sixth and Fourteenth Amendment right to a jury trial, because the DSL "assigns to the trial judge, not to the jury, the authority to find the facts that expose a defendant to an elevated 'upper term' sentence." *Cunningham*, 127 S. Ct. at 860. This Court found that because imposition of an aggravated term required additional fact finding by a judge, the middle term was the "statutory maximum" under the DSL. *Id.* at 860, 868.

California's death penalty procedures satisfy the requirements of *Apprendi*, *Ring*, *Blakely* and *Cunningham*. In California, not all defendants convicted of first degree murder are subject to the death penalty. Instead, "a defendant in California is *eligible for the death penalty* when the jury finds him guilty of first-degree murder and finds one of the § 190.2 special circumstances true." *Tuilaepa v. California*, 512 U.S. 967, 975, 114 S. Ct. 2630, 129 L. Ed. 2d 750 (1994) (emphasis added); accord, *Brown v. Sanders*, 546 U.S. 212, 220, 126 S. Ct. 884, 163 L. Ed. 2d 723 (2006); *Bell*, 40 Cal. 4th at 620 (Pet. App., at A52). Accordingly, the special circumstances listed in California Penal Code section 190.2 are the "functional equivalent of an element of a greater offense" which must be found true by a jury beyond a reasonable doubt. *Ring*, 536 U.S. at 609, citing *Apprendi*, 530 U.S. at 494 n.19.

In a California death penalty case, all determinations necessary to make the defendant eligible for death (crime, degree, and special circumstance) are made by the jury unanimously and beyond a reasonable doubt at the guilt phase. *Bell*, 40 Cal. 4th at 620 (Pet. App., at A52); *People v. Anderson*, 25 ~~Cal~~. 4th 543, 589 n.14, 22 P.3d 347, 106 Cal. Rptr. 2d 575 (2001). Here, the jury made all factual findings, unanimously and beyond a reasonable doubt, that rendered Petitioner eligible for the death penalty. Specifically, the jury found Petitioner guilty of first degree murder and found as true a robbery-murder special circumstance. *Bell*, 40 Cal. 4th at 594.

(Pet. App., at A12.) Accordingly, the California Supreme Court's rejection of Petitioner's argument does not conflict with this Court's decisions in *Apprendi*, *Ring*, *Blakely* or *Cunningham*.

In arguing that California's death penalty law is infirm, Petitioner confuses the term "aggravating circumstance" as used in *Ring*, which he seems to equate with "aggravating circumstances" in a special sense in California Penal Code section 190.3. (Pet. at 18-21, 23.) In fact, the "special circumstances" in California Penal Code section 190.2, which must be proven to a jury beyond a reasonable doubt, are the facts that are equivalent to "aggravating circumstances" in this Court's *Ring* jurisprudence. *See Tuilaepa v. California*, 512 U.S. at 971-76.

This Court's restatement of the holding of *Ring* in *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003) compels this conclusion:

> In *Ring v. Arizona*, 535 U.S. 584 . . . , we held that aggravating circumstances that make a defendant eligible for the death penalty 'operate as 'the functional equivalent of an element of a greater offense.' That is to say, for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of "murder plus one or more aggravating circumstances": Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum *permissible* sentence to death. Accordingly, we held that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt. *Id.* at 608-609[.]

Sattazahn v. Pennsylvania, 537 U.S. at 111. (Emphasis added.)

As *Sattazahn*'s discussion of *Ring* makes clear, what *Ring* referred to as a "aggravating circumstance" is what California calls a "special circumstance," i.e., that which authorizes an increase in the maximum permissible sentence to death. As noted, in a California death penalty case, once the jury has unanimously determined beyond a reasonable doubt that a first-degree murder under special circumstances has been committed, there is no further factual question which must be resolved before death can be imposed.

Tuilaepa v. California, 512 U.S. at 975; Cal. Penal Code § 190.2.

Once the jury determines a defendant is eligible for the death penalty, the nature of the proceedings fundamentally changes. At the penalty phase, there are no specified factual determinations to make as such, only a normative, moral evaluation of the offense and the offender based on the considerations listed in California Penal Code section 190.3. *Bell*, 40 Cal. 4th at 621 (Pet. App., at A-51); *People v. Lewis & Oliver*, 39 Cal. 4th 970, 1067, 140 P.3d 775, 47 Cal. Rptr. 3d 467 (2006); Cal. Penal Code § 190.3. Thus, penalty phase jurors, including the ones in Petitioner's case, are instructed:

> [Y]ou shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances[.] . . . . In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

California Criminal Jury Instructions ("CALJIC") No. 8.88; 52 RT 4411-4412.

At no point is the penalty jury instructed that any additional factual finding is necessary to impose death.

As the California Supreme Court explained in rejecting an *Apprendi/Ring* claim like Petitioner's:

> Under the law of this state, all of the facts that increase the punishment for murder of the first degree -- beyond the otherwise prescribed maximum of life imprisonment with possibility of parole to either life imprisonment without possibility of parole or death -- already have been submitted to a jury (and proved beyond a reasonable doubt to the jury's unanimous satisfaction) in connection with at least one special circumstance, prior to the commencement of the penalty phase. (*See* § 190.2.)

People v. Griffin, 33 Cal. 4th 536, 595, 93 P. 3d 344, 15 Cal. Rptr. 3d 743 (2004).

Consequently, no further facts need to be proved at the penalty phase in order to increase the punishment to either death of life without the possibility of parole as both are proscribed as possible penalties. *People v. Griffin*, 33 Cal. 4th at 595. While at the penalty phase the choice between the two proscribed sentences depends on a determination as to which penalty is more appropriate, which in turn depends on a determination of whether the evidence in aggravation substantially outweighs that in mitigation, "the ultimate determination of the appropriateness of the penalty and the subordinate determination of the balance of evidence of aggravation and mitigation do not entail the finding of facts that can increase the punishment for murder of the first degree beyond the maximum otherwise prescribed." *People v. Griffin*, 33 Cal. 4th at 595. Furthermore, "those determinations do not amount to the finding of facts, but rather constitute a single fundamentally normative assessment [citations] that is outside the scope of *Ring* and *Apprendi*." *Id.*

The California Supreme Court's holding in this regard is entirely consistent with this Court's precedent. The penalty-phase task of assessing aggravating and mitigating factors falling within the traditional scope of capital sentencing, which inform the choice between a greater and a lesser penalty, does not raise the ceiling of the sentencing range available. *Jones v. United States*, 526 U.S. 227, 251, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). As this Court observed in another case interpreting *Apprendi*, not "'every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution.'" *Harris v. United States*, 536 U.S. 545, 558, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002) (plurality opinion) (quoting *Jones*, 526 U.S. at 248). Thus, "factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments." *Harris v. United States*, 536 U.S. at 558; *see United States v. Watts*, 519 U.S. 148, 156, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997) (per curiam); *Nichols v. United States*, 511 U.S. 738, 747, 114 S. Ct. 1921, 128 L. Ed. 2d 745 (1994); *Williams v. New York*, 337 U.S. 241, 246, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949). Because *Apprendi*, *Ring*, *Blakely*, and *Cunningham* apply only to those factual determinations that raise the ceiling of the sentencing range available, *Harris* and *Jones* confirm that California's penalty

phase procedures are not constitutionally infirm.

In short, both this Court and the California Supreme Court have held that under California law, death is an available punishment upon conviction of first degree murder under special circumstances. *Tuilaepa v. California*, 512 U.S. at 974; *People v. Prieto*, 30 Cal. 4th 226, 262-63, 66 P.3d 1123, 133 Cal. Rptr. 2d 18 (2003). Nothing in *Apprendi*, *Ring*, *Blakely*, or *Cunningham* suggest that the constitutional safeguards discussed therein apply at the penalty selection phase, where jurors are deciding whether the evidence in aggravation and mitigation warrants imposition of the already-authorized death penalty. Accordingly, there is no basis for this Court to grant certiorari.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that certiorari be denied.

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Respectfully submitted,

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